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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 679.

AMERICAN BANK & TRUST COMPANY ET AL.

vs.

FEDERAL RESERVE BANK OF ATLANTA ET AL.

ON APPEAL FROM FIFTH CIRCUIT COURT OF APPEALS.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Statement of the Case.

On the fifteenth day of January, 1920, a number of banking institutions, chartered under the laws of the State of Georgia and doing business in the smaller towns of the State (for convenience designated "Country Banks"), filed an equitable action in Fulton Superior Court (the Atlanta Circuit) against the Federal Reserve Bank of Atlanta and four individuals holding executive offices in said Reserve Bank. The bill was filed in behalf of plaintiffs as representative of the entire class of Country Banks. Injunction was prayed, and a restraining order was granted.

The allegations of the bill disclosed that Country Banks were subject to the regulating power of the State of their creation; were authorized to do business on small capital under the policy of the agricultural State of Georgia to afford banking facilities to its rural population and enable small farmers and manufacturers to obtain working capital at reasonable rates of interest. Under this policy some five hundred Country Banks are doing business in the State, out of a total of six hundred and ten State banks, with an aggregate capital of about twenty million dollars. More than two hundred of these Country Banks operate on a capital of twenty thousand dollars or less.

One of the fundamental and important functions performed by commercial banks is the use of checks payable on demand, drawn against deposits in said banks, which are used in commercial transactions in lieu of actual money. The best estimates on the subject place the performance of checks, compared with the used of actual currency, as twenty to one in the media of exchange.

The bank check is the instrument by which customarily a depositor seeks to withdraw his funds, or any part thereof, from the bank. It is a draft or order on the bank requiring it to pay a sum named. The initial and primary obligation of the bank upon which such a check is drawn is to pay the same over its counter in current funds on demand, charging the amount of the same against the deposit account of the drawer of said check.

A custom has grown up in the banking business, however, whereby a great majority of checks thus drawn against accounts are handled through banking channels in such manner as that they reach the several banks upon which they are

drawn through the mails by correspondence between the banks handling such checks. When checks are thus sent through the mails a service is demanded of the bank upon which they are drawn in excess of the mere payment of such check, some of the elements of which may be thus enumerated:

A record must be made showing from whom said check was received and the amount thereof. The party transmitting said check, not being a resident of the same place in which the drawee bank is located, expects a remittance of the proceeds of said check in funds available at the place of the sender's residence, or else in New York exchange which by universal custom has come to be current throughout the country. It thus becomes incumbent on the drawee bank to maintain at different financial centers funds which may be drawn upon to cover remittances necessary to cover proceeds of checks thus sent to it through the mails. These funds are maintained by such banks through the medium of deposits to its credit in banking institutions located in such financial centers, which deposit account must be maintained in amounts adequate to meet the average necessities of said drawee bank. To maintain these balances against which such remittance drafts are drawn, the drawee bank must transmit funds from time to time to such depositories and pay the cost of such transmission. In addition to this, the draft covering the proceeds of the check must be written up by competent clerical force and duly recorded on the records of said bank and properly credited to the account of its depository. And when the transaction is completed of record in the drawee bank, letters of remittance must be prepared by competent clerical force and postage paid for the

return of such remittance to the correspondent through the mails.

The services thus required in the drawee bank to handle checks drawn upon it and sent through the mails, as above described, necessarily increase its expenses of doing business. This service inures directly to the benefit of the payee, or original recipient, of said check and subsequent holders thereof by endorsement in regular course of business, and is the primary means through which checks have come to be so large an element in the media of exchange in lieu of actual currency. In order to compensate for this service it has long been the universal custom of banks, except in the matter of checks drawn between large financial centers, to make a charge of a small per cent of the amount of such checks, which is deducted from the proceeds thereof and is commonly called "exchange." The word "exchange" as here used should not be confounded with the meaning of the word as applied to drafts on funds in financial centers commonly called "exchange." The word "exchange," as applied to the charge for the service rendered in remitting checks through the mails means compensation for such service.

This service includes the overhead above stated as well as the loss of the use of the funds in transit and the cost of their transportation. The aggregate value of such service performed by the Country Banks of Georgia is a million dollars per annum, and under long-established custom is paid for by that portion of the business world receiving the benefit of the transactions thus liquidated. The average cost of performing this service through the Atlanta Clearing-house is \$1.11 per thousand dollars, and the customary charge for the service by the Country Banks is \$1.25 per thousand dollars.

Compensation for said service constitutes one of the most important sources of revenue of the Country Banks and the continuation of the right to make such charge is essentially important to their prosperity and the continued discharge of their duties under the policy of the State of Georgia by which they are regulated, and to the performance of their functions in the general growth and prosperity of the rural communities of the State.

In addition to the economic value of the service thus rendered, and the enlargement of the use of such checks in the business of the country through correspondents, as above explained, the great hazards of handling so large a volume of transactions by the use of currency are avoided. Opportunities for theft and defalcation are reduced to a minimum, and the expenses of transmission of actual currency, burglary insurance, and the proper care and safeguarding of money, are brought down to the lowest level.

When a bank foregoes any charge for the collection and remittance service, hereinbefore described, and forwards draft to cover the amount of any such checks so sent through the mails without any deduction for said service, the banking term employed in such a case is called "Remitting at Par."

The Federal Reserve act creates a Federal Reserve Board, which is given general supervision over all Federal Reserve banks and their member banks.

Said Federal Reserve act expressly recognizes the propriety of charging for the collection and remittances for checks through correspondents, but exempts all Federal Reserve banks, including the defendant Reserve bank, from all such charges. Nothing in the act is held to prohibit member banks from charging for the extra expense incurred in col-

lecting or remitting funds or exchange to its patrons, subject to regulations by the Federal Reserve Board, which board is required to make and promulgate from time to time regulations governing the transfer of funds and the charges therefor among the Federal Reserve banks and their branches.

The scope of such regulations and fixation of charges for collection and remittances are limited by the act to Federal Reserve banks and their members or clearance depositors.

Less than two per cent of the banking institutions created by the State of Georgia, outside of its large cities, have voluntarily exercised their right to become members or clearance depositors in said Federal Reserve Bank. A very large percentage of them are not qualified for such membership without increasing their capital stock to a point which would make it impossible under their volume of business to pay taxes and dividends on it.

A conspiracy is charged against defendants, acting in concert with the Federal Reserve banks in other districts under instructions of the Federal Reserve Board, to compel State banks to submit themselves to the jurisdiction of the Federal Reserve Board, either by joining the Federal system outright or by non-member clearing accounts with the Federal Reserve bank of their respective districts. This action is to be compelled regardless of its ruinous effect upon Country Banks and the destruction of their usefulness in the small communities they serve.

Some time prior to December 23, 1919, the Federal Reserve Board at Washington was in receipt of a letter from some bank not a member of the Federal Reserve system protesting against the policy which had been adopted by the Federal Reserve banks, with the approval of the Federal

Reserve Board, in the matter of collection at par of checks received by the Federal Reserve bank, either from their member banks or from non-member banks maintaining clearing or collection accounts with them, but drawn on banks wholly outside the Federal Reserve system.

In reply to said letter, the Federal Reserve Board defined its conception of the law and policy relative to the collection of bank checks and drafts at par. After quoting and explaining their conception of the provisions of the Federal Reserve act on the subject, the Federal Reserve Board announces the policy of ultimately establishing a universal or national system of clearing bank checks and drafts at par, and claims that the one obstacle to the immediate inauguration of such a system is the ability of the small Country Banks to maintain balances with some city correspondent by means of which checks deposited with them will be handled at par, and through which they can remit in exchange to cover checks drawn on them through the mails.

The Federal Reserve Board expresses the opinion that but for this facility of doing business with institutions of their own selection by petitioners and other banks in like situation, there is no doubt that many more of such banks would avail themselves of the privileges tendered by the Federal Reserve banks.

The Federal Reserve Board further make it clear that because the Federal Reserve banks are exempted from all collection charges, they cannot inaugurate a system of universal par clearance, where non-member banks refuse to remit for their checks, at par, and that therefore some other means of collecting such checks must be inaugurated, no matter how expensive, claiming the right in a Federal Reserve bank to

incur unlimited expense in making such collections, although it is prohibited from paying the nominal rate of exchange, even of \$1.00 per thousand.

Said policy thus promulgated by the Federal Reserve Board was on December 23, 1919, formally announced by the Federal Reserve Bank of Atlanta.

Invitation was extended Country Banks to voluntarily relinquish their sources of revenue in compensation for services rendered, and remit at par for all checks sent them through the mails, with the plain threat that if this invitation was not accepted defendant would be forced to adopt other methods of collection that would prove embarrassing, annoying and expensive to the Country Banks. Recognizing the burdens imposed by consenting to remit at par, offers were made to absorb the postage and express charges, but leaving all other expense, clerical and otherwise, to be borne by the banks without compensation.

The offer was also made to allow Country Banks to open a non-member clearing account with defendant Reserve Bank which would take away from the correspondent banks in the large cities in Georgia their deposit accounts and centralize them in the Federal Reserve Bank. This proposed clearing account would necessitate the maintenance of a large increase of the reserves now carried by Country Banks, because the deposit items thereunder would be carried by defendant Reserve Bank in suspense, or "Uncollected Funds Account," as it is called, until actually paid; whereas under the present system immediate credit subject to check is entered on receipt of such items from Country Banks by their correspondents.

Items in transit, technically called the "float," are carried in suspense by the defendant Reserve Bank from date of receipt until the actual return of proceeds into the Federal Reserve Bank. The consequence is that Country Banks would frequently appear to be overdrawn in such an account, although large credit balances would appear but for the suspense items afloat. Such a condition does not arise under present methods. Frequently the incoming checks, technically called the "daily letter," are equalled or exceeded by items received through deposit windows and the remittance draft covering the former is provided for by the immediate credit of the latter, both being carried to destination by the same mail. Thus the slack in reserve is always taken up, while under defendant's proposed clearing account it might easily happen that the float in suspense would equal the entire assets of a country bank, and render it unable to meet its daily obligations.

Jurisdiction of the defendant Reserve Bank in its corporate capacity, and of each of the individual defendants under the cover of their official connection with it, over any bank created by the sovereign State of Georgia, which has not voluntarily submitted to said jurisdiction, is denied. There is very little inducement to join it by a bank with any choice in view of the policy of its management, which has transformed it into a money-making institution, entering into competition with its members on whose capital it operates. As a result of these practices defendant Reserve Bank made over 100 per cent on the capital furnished by its members during the year 1919, and its statement shows average earnings of about 33½ per cent per annum, since its

organization, clear of all expenses of its operation (the amount of which expenses does not appear in its statements), of which earnings only 6 per cent, per annum, is distributed to its members who furnish the capital. Regardless of the construction or interpretation of the Federal Reserve act, Congress has no power even by a direct, explicit and mandatory enactment, to coerce State banks against their will to submit to the jurisdiction of defendant Reserve Bank, either as members or non-member banks. There is no warrant in law for perverting the Federal Reserve act into an instrument of autocratic tyranny to compel petitioners and other banks created by the State of Georgia to sacrifice their charter rights and legitimate revenues to fatten the swollen profits already piling up in the Federal Reserve Bank, which at present are about one and three-eighths times as great as their aggregate capital stock.

Said individual defendants, under the cloak of their official connection with the defendant Reserve Bank, threaten and intend to use the great resources of said Reserve Bank to compel Country Banks to either join said Federal Reserve Bank or else have their business so interfered with and their revenues so depleted by the embarrassing, annoying and expensive methods in preparation for exploit upon them as to drive them out of business altogether. Country Banks in sparsely settled and remote agricultural sections of the State cannot meet the requirements necessary to membership in the Federal Reserve Bank, nor can they deplete their revenues by remitting at par and continue the successful prosecution of their small, but useful and necessary, business functions in their respective communities.

Whether or not the defendant Reserve Bank will accept checks at par drawn on banks not holding membership in it is optional with it and not mandatory. The said bank has been in operation more than five years, and not until recently has it undertaken to handle checks on non-members at par, unless the drawee bank was located at a financial center of such size as to make it what is known as a "Par point."

One of the embarrassing, annoying and expensive expedients to which the defendants intend to resort is to accumulate checks drawn on Country Banks in the State of Georgia until the aggregate thereof is a large amount and then, sending a special messenger to the counter of the bank on which said checks are drawn, demand payment thereof in currency over the counter. Such a course would inevitably drive a small Country Bank out of business. Without notice as to when such checks will be presented, or as to the amount thereof, it would be necessary for such bank to carry an amount of money in its vault large enough to meet any emergency of this kind and would destroy its capacity to lend out said funds in regular course of business and therefore cause the loss of the interest revenues now derived from such loans. In addition to this, the appearance in a small village, or town, of a stranger and unknown person in an automobile, or other conveyance, and his subsequent withdrawal, under the eyes of the attendant and curious crowd of country people, of large sums of currency from the local bank, the same to be carried away in the presence, perhaps, of many of the depositors of said bank, is calculated to, and in all probability would, result in an immediate run on said

bank that would promptly put it out of business. The reputation of a bank is exceedingly sensitive, and any criticism or suspicion of it, whether well or ill founded, speedily enlarges into distrust, condemnation and ruin.

Another embarrassing, annoying and expensive method that defendants expect to employ is to hire a special agent in each town where State banks do business, and mail checks on such local bank to said agent with instructions that he present same at the counter of the bank upon which same are drawn and demand payment in currency. Since this currency would necessarily have to be transmitted back to the defendant Reserve Bank and the cost thereof paid by it, such a method is employed for an ulterior purpose, rather than in good faith for the purpose of collecting said checks, and that ulterior purpose is to coerce Country Banks to bow to the will of defendants in the matter of remitting at par to cover their daily letters and ultimately to coerce Country Banks to either join said Federal Reserve Bank or maintain a clearing deposit account with said bank. The evils of such a method of collecting checks differ only in degree from those set forth in a preceding paragraph where said collection is made by a special messenger in automobiles or other conveyances. The effect upon the constant maintenance of cash in vault to meet liabilities, and the consequent material depletion of the reserves of Country Banks in financial centers, would be the same.

Another embarrassing, annoying and expensive method that the defendants expect to employ in their effort to coerce submission of Country Banks to the jurisdiction of said Federal Reserve Bank, is the transmission of said checks to the

local postmaster, or through the express companies, for collection in currency over the counters of the bank on which they are drawn. Since the rates for such collections by express or post-office remittance are equal to, or greater than, the rate of exchange now charged on remittances to cover such checks, the employment of such a method would be in bad faith. The evils of having checks thus presented and paid in currency would be as great under this method as under either of the others, and would materially interfere with the successful prosecution of the legitimate business of Country Banks which they are now expressly authorized to do under their several charters from the State of Georgia.

The adoption of any of the methods hereinbefore described, or any like methods for the purpose of coercing Country Banks to relinquish the revenue accruing to them by exchange on remittance, would operate to deprive them of their property without due process of law in violation of that clause of the third paragraph of the bill of rights of the Constitution of the State of Georgia which provides that no person shall be deprived of life, liberty or property without due process of law.

Such method is useless, tyrannical, *ultra vires* the charter of said defendant Reserve Bank, and the threat to employ such a method is a perversion, if not a prostitution, of the functions of such a great institution. When such method is employed for the purpose of coercing and oppressing Country Banks created by the State of Georgia it amounts to an invasion of their rights granted under their charters.

The individual defendants admit that this method has been employed in other States to force unwilling State banks

into line, and in view of their threat they expect to use this method on Country Banks in Georgia, unless restrained from doing so by a court of equity.

Relatively, the service of these small Country Banks to their respective communities is as necessary and important to those communities as are the services of larger institutions in populous cities, including the Federal Reserve system itself, and the public policy of the State of Georgia as found in its Constitution and laws encourages the creation and activities of said small Country Banks. Of the 792 banks in the State of Georgia, some 610 are chartered by the State of Georgia, the others being national banks. Of the 610 State banks, some 510 are located outside of the large cities of the State and come within the classification of Country Banks. Of the 510 Country Banks, some 224 have a capital stock of \$20,000.00 or less and not one of these banks could meet the conditions necessary to membership in the Federal Reserve Bank without the increase of its capital stock to a point beyond which it could earn taxes and dividends thereon, and such increase would in many cases be impossible, as the additional stock could not be sold. On the other hand, none of said small banks could successfully continue in business without the benefit of the compensation for their services for remittance covering checks. Consequently, if the coercive schemes of the defendant are permitted to fructify these small but useful and necessary State institutions will be driven out of business and the public policy, to say nothing of the local self-government of the State of Georgia, will be outraged and overridden by the autocratic tyranny proposed to be exercised by the defendants hereto, operating in

the name, but outside the power of, the defendant Reserve Bank created by Congress for a purpose entirely foreign to any such objects and purposes.

The Country Banks in Georgia declined to accede to the demand of defendants to remit at par, and a committee was appointed to confer with the defendants on behalf of petitioners and other banks in like condition in an effort to accommodate the situation and persuade the defendants to recede from their effort to compel compliance with their demands. This committee conferred with the individual defendants herein named, on more than one occasion, and was informed on each occasion that the defendants intended to insist upon remitting at par or else would employ methods to compel such course on the part of Country Banks; and stated that they were preparing their plans of action and would put them in operation as soon as they were completed.

At the time the bill was filed said individual defendants were actively engaged in the preparation and perfection of plans to put in operation said measures hereinbefore described, or other measures of like import, with the avowed object of compelling Country Banks to accede to said demands.

Removal.

The cause was removed to the United States District Court for the Northern District of Georgia, and a motion to remand same was filed and overruled (Trans., 75).

The grounds of this motion challenge the jurisdiction of the United States court:

First. Because it appears from the record in said case, as a matter of law, that such suit does not really and substantially

involve a dispute or controversy properly within the jurisdiction of the District Court of the United States for the Northern District of Georgia.

Second. Because said case is not legally removable from the Superior Court of Fulton County, in which it was brought, to the District Court of the United States for the Northern District of Georgia, which would otherwise be the proper district court of the United States to which removal thereof could be lawfully had, for that it appears from the record of said case, as a matter of law, that it is not a case of which the district courts of the United States are given original jurisdiction under the Constitution and laws of the United States.

The same questions involving jurisdiction were raised in the State court in opposition to removal (Tran., 58).

Jurisdiction.

The lower court upheld the jurisdiction of the United States court on two grounds:

First. That the cause of action arises under the Constitution and laws of the United States because it is a suit against a corporation created and organized under and pursuant to an act of Congress, and involves the construction of that act in so far as the charter powers of that corporation are concerned.

Second. That a Federal Reserve Bank is not a national banking association within the scope and meaning of the acts of Congress of July 12, 1882, August 13, 1888, and the

Judicial Code, which place national banking associations, for the purpose of action by and against them, upon the footing of other citizens.

On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the decree of the district court upholding jurisdiction and dismissing the bill, and the present appeal to the Supreme Court was duly allowed, the same being a case in which the decree of the Circuit Court of Appeals was not final by reason of jurisdiction being based upon the nature of the case.

Assignments of Error.

Omitting formality of expression, the assignments of error (Transcript, p. 129) are based upon alleged error in the decrees appealed from, in that they do not support and uphold the following legal propositions:

Relating to Jurisdiction.

1. This case does not arise under the laws of the United States within the meaning of the Constitution and judiciary acts conferring jurisdiction on the trial courts of the United States by reason of the nature of the case.

Assignments 1 and 10 (Transcript, pp. 130, 131).

(a) The charge of *ultra vires* acts of the Federal Reserve Bank does not make the plaintiffs' case one arising under the banks' charter, a law of the United States, because, if the charge is sustained, the acts complained of are outside of this law

Assignments 3 and 9 (Transcript, pp. 130, 131).

(b) Under the Judiciary Act of 1887-8 (25 Statute, 423), as now embodied in the Judicial Code, section 24, the Federal origin of a corporation confers jurisdiction over its cases because arising under laws of the United States *only* when such corporation is the plaintiff and not when it is defendant. If the plaintiffs' case, as alleged, is one arising under the laws of the United States, the fact that the defendant is a Federal corporation has no bearing upon the subject of original jurisdiction in such case when brought in the courts of the United States.

Assignment 4 (Transcript, p. 130).

(c) Capacity to be sued and served as a defendant is the only function derived from a Federal law upon which appellants' case in court depends. That function relates alone to the party defendant, and not to the plaintiffs' cause of action, unless it be true that the absence of a party upon whom process can be served operates to destroy the foundation of the cause of action otherwise existing.

Assignments Nos. 4 and 10 (Transcript, pp. 130, 131).

2. Federal Reserve Banks are national banks within the meaning of the statutes denying jurisdiction over national banks in the Federal courts.

Assignment No. 2 (Transcript, p. 130).

(a) These statutes, now embodied in the Judicial Code, section 24, paragraph 16, relate to the genus of the corporation and not to its detailed corporate powers. Hence all

the corporate powers of commercial national banks need not be included in the corporate powers of Federal Reserve Banks as a condition to the latter falling within the category of national banks that are denied entrance into the Federal courts solely on the ground of their Federal origin.

Assignments Nos. 5, 6, and 7 (Transcript, pp. 130, 131).

3. Failure to expressly withhold jurisdiction over Federal Reserve Banks, *eo nomine*, in the Federal Reserve Act does not imply retention of jurisdiction over them, because the jurisdiction of the inferior courts of the United States is derivative and must rest on express congressional legislation, unaided by presumption, inference, or implication.

Assignment No. 8 (Transcript, p. 131).

Relating to the Merits.

4. The allegations of the bill, being admitted by the motion to dismiss, authorized injunctive relief prayed for.

Assignment No. 11 (Transcript, p. 131).

5. Nothing in the Federal Reserve Act justifies the conclusion that Congress had the intention and purpose of establishing universal par clearance in the United States.

Assignments Nos. 12, 20, 23 (Transcript, pp. 130, 133).

6. The proviso to section 13 of the Federal Reserve Act, prohibiting charges for collection of checks and remission of

their proceeds, includes *all* such charges, whether made by banks or by other corporations or persons, and amounts to a prohibition of payment of any such charges by a Federal Reserve bank to any person whomsoever.

Assignments Nos. 13 and 19 (Transcript, pp. 131, 132).

7. Aside from the statutory prohibition of payment for the service of collecting checks and transporting their proceeds, the methods of such collection by the defendants, duly alleged and admitted, are employed for an ulterior purpose which, if accomplished, results in compelling appellants to perform a valuable service for defendants without compensation, which is contrary to law and so unfair and oppressive as to warrant injunctive relief in a court of equity.

Assignments Nos. 14 and 17 (Transcript, p. 132).

(a) The doctrine of duress has no application to the facts of this case.

Assignment No. 15 (Transcript, p. 132).

(b) Mandatory injunction is neither prayed for nor necessary in this case.

Assignment No. 16 (Transcript, p. 132).

8. *Ultra vires* acts may be restrained by persons suffering private injury thereby, although such private persons may not be stockholders of the offending corporation.

Assignment No. 18 (Transcript, p. 132).

9. An illegal conspiracy may arise from lawful acts accomplished by lawful means where the ulterior purpose of such

concerted action is injury to the business and property rights of others for the ultimate benefit of the conspirators. This is true because the use of lawful means as a cloak for the accomplishment of a legal wrong to the party against which they are employed operates to make the means themselves unlawful.

Assignments Nos. 21, 22, 23, and 24 (Transcript, pp. 133, 134).

10. All unfair competition in business is rooted in the purpose of ultimate gain to flow from present loss incurred in coercing or subjecting competitors, and thereby destroying competition.

Assignment No. 24 (Transcript, p. 130).

Points.

Jurisdiction.

1. This case was wrongfully removed to the United States court and should have been remanded, because it could not have been originally brought in the district court of the United States.

Judicial Code, section 24.

Federal laws supporting the defense do not confer jurisdiction.

Tennessee *vs.* Bank, 152 U. S., 454.

Great Northern *vs.* Alexander, 246 U. S., 276.

Williams *vs.* First National Bank, 216 U. S., 582, 594.

Policy of act March 3, 1887, as corrected by act August 13, 1888 (24 Stat., 552, c. 373; 25 Stat., 433, c. 866), was to contract jurisdiction of the United States District Courts.

Smith vs. Lyon, 133 U. S., 315, 320.

Arkansas vs. K. & T. Coal Co., 183 U. S., 185, 188.

In re Pennsylvania Co., 137 U. S., 451, 454.

Fisk vs. Hinaire, 142 U. S., 459, 467.

Shaw vs. Quincy, 145 U. S., 444, 449.

Minnesota vs. Northern Securities Co., 194 U. S., 48.

Case Does Not Arise under Laws of the United States.

2. This case could not have been brought in the District Court of the United States for the Northern District of Georgia because of the absence of requisite diversity of citizenship, and under the allegations of the plaintiffs the cause of action is not founded on a law of the United States, and therefore the nature of the case is not that of one arising under the Constitution and laws of the United States.

American Well Works vs. Layne, 241 U. S., 257.

"A suit arises under the law that creates the cause of action."

Louisville & Nashville R. R. vs. Mottley, 211 U. S., 149.

Taylor vs. Anderson, 234 U. S., 74.

In re Winn, 213 U. S., 458.

Jurisdiction is not conferred by allegations anticipating defenses which may be interposed under Federal laws.

St. Paul vs. St. Paul (8 C. C. A.), 68 Fed., 2.

L. & N. R. R. vs. Mottley and kindred cases, *supra*.

A Federal Reserve Bank is a National Bank.

3. The fact that the defendant Reserve Bank was created by a law of the United States does not confer jurisdiction upon the courts of the United States of a suit by a Federal Reserve Bank in the absence of requisite diversity of citizenship, because it is a national bank and the primary jurisdiction of Federal courts over national banks is restricted by statute.

Original Nat. Bank Act, Feb. 25, 1863, ch. 58, sec 50 (12 Stat., 681).

Act June 3, 1864, ch. 106, sec. 57 (13 Stat., 116).

Rev. Stats., 5198.

Rev. Stats., 563, subdiv. 15.

Rev. Stats., 629, subdiv. 10.

Under these acts the character of the bank alone determined the question of jurisdiction.

Pittsburgh vs. Pittsburgh, &c., 1 Fed. Rep., 190.

These acts were not repealed by the Judiciary Act of March 3, 1875, chapter 137, section 1 (18 Stat., 470).

St. Louis Bank vs. Harrison, 8 Fed., 721.

Commercial Bank vs. Simmons, 1 Flipp, 449; 6 Fed. Cases, No. 3062.

The following decisions are based on these acts:

Wilson County vs. Nashville 3rd Nat. Bank (1881).
103 U. S., 770.

Danahy vs. National Bank (C. C. A. 1894), 64 Fed. Rep., 148.

Ex p. Jones (1897), 164 U. S., 692.

Petri vs. Commercial Nat. Bank (1892), 142 U. S., 644.

Speckart vs. German Nat. Bank (1898), 85 Fed. Rep., 12.

Mitchell vs. Walker (1879), 7 Rep., 425; 17 Fed. Cas., No. 9,670.

St. Louis 3rd Nat. Bank vs. Harrison (1881), 8 Fed. Rep., 721.

Omaha 1st Nat. Bank vs. Douglass County (1873), 3 Dill (U. S.), 298; 9 Fed. Cas., No. 4,809.

But the act of July 24, 1882, ch. 290, sec. 4, placed national banks in the same category with banks not organized under the Federal laws, and since the passage of such act the jurisdiction of the Federal circuit court over suits by or against them could no longer be asserted on the ground of their Federal origin.

Leather Manufacturers' Bank vs. Cooper (1887), 120 U. S., 778.

Whittemore vs. Amoskeag Nat. Bank (1890), 134 U. S., 527.

Petri vs. Commercial Nat. Bank (1892), 142 U. S., 644.

Ex p. Jones (1897), 164 U. S., 693.

National Bank vs. Fore (1885), 25 Fed. Rep., 209.

Union Nat. Bank vs. Miller (1883), 15 Fed. Rep., 703.

Danahy vs. National Bank (C. C. A. 1894), 64 Fed. Rep., 148.

Wichita Nat. Bank vs. Smith (C. C. A. 1896), 72 Fed. Rep., 568.

Since the passage of this act national banks are placed upon precisely the same footing as individuals or other corporations with respect to the right to sue and be sued in the Federal courts.

Continental Nat. Bank *vs.* Buford (1903), 191 U. S., 123.

Petri *vs.* Commercial Nat. Bank (1892), 142 U. S., 644.

Ex p. Jones (1897), 164 U. S., 693.

Danahy *vs.* National Bank (C. C. A. 1894), 64 Fed. Rep., 148.

Farmers Nat. Bank *vs.* McElhinney (1890), 42 Fed. Rep., 801.

Grand Haven First Nat. Bank *vs.* Forest (1889), 40 Fed. Rep., 705.

Freeman Mfg. Co. *vs.* National Bank (1894), 160 Mass., 398.

"National Banking Associations" is synonymous with "National Banking Corporations" and with "National Banks."

Definitions in Federal Reserve Act.

"Association" is generic and describes a corporation.

U. S. *vs.* Martindale, 146 Fed., 284.

U. S. *vs.* Trinidad, 137 U. S., 169.

Associations formed under the Banking Act are moneyed corporations.

Niagara Co. *vs.* People (N. Y.), 7 Hill, 504.

Jurisdiction of the United States trial courts is limited and must rest on *express* authority under acts of Congress and takes nothing by implication.

Brown vs. Keene, 8 Pet., 112.

Grace vs. Am. Cent. Ins. Co., 109 U. S., 278.

Hanford vs. Davies, 163 U. S., 273.

On the Merits.

5. If the jurisdiction be upheld, it was error to dismiss the bill on the merits.

International News Service vs. Asso. Press, 248 U. S., 215, 235.

In re Sawyer, 124 U. S., 200, 210.

In re Debs, 158 U. S., 564, 593.

Traux vs. Raich, 239 U. S., 33, 37-38.

Breman vs. United Hatters, 73 N. J. S., 729, 742.

Barr vs. Essex Trades Council, 53 N. J. Eq., 101.

Employing, &c., vs. Blosser, 122 Ga., 509.

Jones vs. Vanwinkle, 131 Ga., 336.

Chicago, &c., vs. Franklin, &c., 220 Ill., 355; 77 N. E., 176.

Atchison, etc., R. Co. vs. Gee, 139 Fed., 582, 584.

Jersey City Printing Co. vs. Cassidy, 63 N. J. Eq., 756; 53 Atl., 230.

Atkins vs. W. A. Fletcher Co., 65 N. J. Eq., 658; 55 Atl., 1074.

Union Pac. R. Co. vs. Ruef, 120 Fed., 102.

Beck vs. Railway Teamsters' Protective Union, 118 Mich., 497; 42 L. R. A., 407, 416; 74 Am. St. Rep., 421; 77 N. W., 13.

Otis Steel Co. *vs.* Local Union No. 218, 110 Fed., 698.
 Knudsen *vs.* Benn, 123 Fed., 636.
 Jensen *vs.* Cooks, etc., 39 Wash., 531; 81 Pac., 1069.

The custom of collecting checks by mail well recognized.
 Spear *vs.* United States (8 C. C. A.), 246 Fed., 250.

What are unlawful combinations?

Barnes & Co. *vs.* Chicago, etc., Co., 232 Ill., 424 (83 N. E., 940).
 Hitchman Coal case, 245 U. S., 229.
 Duplex Printing case, Jan. 3, 1921 (not reported).
 Doremus *vs.* Hennessy, 176 Ill., 608 (43 L. R. A., 797).
 Berry *vs.* Donovan, 188 Mass., 353 (74 N. E., 603).
 Plant *vs.* Woods, 176 Mass., 492 (57 N. E., 1011).
 Pickett *vs.* Walsh, 192 Mass., 572 (78 N. E., 753).
 Fletcher *vs.* Int. Asso. of Machinists (N. J. Eq.), 55 Att., 1077.

Accumulating checks for coercive effect of demanding large sums of currency has been condemned by the Supreme Court of Minnesota in the case of—

Peabody *vs.* Citizens, &c., Bank, 108 N. W., 272.

Motive is sometimes controlling.

Coons *vs.* Chrystie, 53 N. Y., 668.
 Thomas *vs.* C., N. O. & T. P. Ry., 62 Fed., 803.
 22 Cyc., 846, 858, and cases cited.

The tendency is away from the doctrine of the cases originating with—

Allen *vs.* Flood, 77 L. T. (N. S.), 717 (46 Week Rep., 258).

Raycraft *vs.* Tayntor, 68 Vt., 219 (54 Am. St. Rep., 882).

Jenkins *vs.* Fowler, 24 Pa., 308.

One of the first departures from this doctrine was announced by Mr. Justice Holmes in—

Plant *vs.* Woods, 176 Mass., 492.

To say that an act lawful under one set of circumstances is lawful under every conceivable set of circumstances is too broad a generalization.

Panton *vs.* Holland, 17 Johns., 92 (8 Am. Dec., 369).

Post *vs.* Munn, 4 N. J. L., 61 (7 Am. Dec., 570).

Springfield *vs.* Jenkins, 62 Mo. App., 74.

Tuttle *vs.* Buck, 107 Minn., 145 (131 Am. St. Rep., 446).

Hitchman Coal case, *supra*.

Duplex Printing case, *supra*.

Private interests may invoke protection from *ultra vires* acts.

Madison *vs.* Madison Gas Co., 129 Wis., 249 (108 N. W., 65).

Atty. Genl. *vs.* R. R., 35 Wis., 425, 429, 541.

Hogan *vs.* Nashville, &c., Co., 174 S. W., 1121 (Tenn.).

Alpena *vs.* Kelly, 56 N. W., 941 (Mich.).

The right to conduct one's business without wrongful interference is a valuable property right.

Hardie Tynes *vs.* Cruse, 66 Sou., 660 (Ala.).

Gray *vs.* Trades Council, 91 Minn., 171 (97 N. W., 663).

Vegelahn *vs.* Guntner, 167 Mass., 92 (44 N. E., 1077).

Beck *vs.* R. T. P. Union, 118 Mich., 497 (77 N. W., 13).

Hitchman Coal case and Duplex Printing case, *supra*.

A valid law may be so wrongfully administered as to place illegal burdens and exactions on the individual.

Reagan *vs.* F., L. & T. Co., 154 U. S., 362, 390.

Ex parte Young, 209 U. S., 123.

Raymond *vs.* Chicago, &c., 207 U. S., 20.

Clearing-houses judicially defined.

Nat. Ex. Bank *vs.* Nat. Bank, 132 Mass., 149.

Philer *vs.* Patterson, 168 Penn., 468.

Crane *vs.* Fourth St. Bank, 123 Penn., 556.

Interpretation of Statutes.

Purpose and design of the legislature must be considered.

U. S. *vs.* Freeman, 3 How., 556.

If within the intention, it is within the letter.

U. S. *vs.* Babbit, 1 Black, 61.

Atkins *vs.* Disintegrating Co., 18 Wall., 381.

Cocciola vs. Wood, &c., Co., 136 Ala., 536-7 (33 So. 856).

Hill vs. Am. Surety Co., 200 U. S., 197, 198, and citations.

Legislators must know and contemplate existing state of the law.

Benton vs. Willis, 88 N. W. (Ark.), 1000.

ARGUMENT.

General Principles.

The first and controlling question involving the jurisdiction of the court in this case may be stated thus:

Does the cause of action of the plaintiff banks arise under the Constitution and laws of the United States?

This question must be determined upon the allegations of the plaintiffs. It may be the plaintiffs allege no cause of action at all, but the determination of that question is the *exercise* of jurisdiction which does not exist unless the cause of action which it attempts to allege arises under the Constitution and laws of the United States. When jurisdiction is challenged the legal effect of the allegations upon which the existence of jurisdiction must be determined need be considered only as bearing upon the nature of the case, and not upon its strength or ultimate validity. In considering the question whether or not jurisdiction *exists*, the allegations of the plaintiff must be taken to be true and to define finally and definitely the kind of a cause of action the plaintiff seeks to set up. This effort may be utterly abortive when the court, having the power to determine it, has considered it and determined it. Although the judges of the court may be of the opinion that no cause of action whatsoever is set forth in the plaintiff's statement of his case, they are powerless to reach such a conclusion until they have first determined that a case of that *genus* can exist and when presented can be legally acted upon *by the court*, which the law creates, and which is personified by the judges presiding

Neither of these rights—these sources of the life of plaintiffs' cause of action—is derived from any Federal law. The fact that a Federal corporation threatens to invade these rights does not affect the question of jurisdiction now under consideration. If such Federal corporation seeks to justify its invasion of these rights by virtue of the Federal law creating it, and thereby invokes an interpretation and enforcement of this law, the questions thus raised involve the defense, and the basis of Federal jurisdiction is not available except by appeal from the final adverse decision of the court of last resort in the State. Nor is jurisdiction on this ground derived from the fact that these Federal questions are anticipated by the allegations of the plaintiffs.

Federal laws and Federal questions must plainly appear from the allegations of bill to be the basis of the suit. Any defense based thereon is insufficient to confer jurisdiction.

Hanford vs. Davis, 163 U. S., 273.

Mountain vs. McFadden, 180 U. S., 533.

Bankers vs. Minn., 192 U. S., 371, 383, 385.

Under the act of 1875 a case was removable if it involved the construction of a Federal law either to maintain the plaintiff's case or established the defense.

R. R. Co. vs. Miss., 102 U. S., 135, 144.

Mr. Justice Miller dissented in that case, and that dissent is supposed to have influenced Congress in modifying the law in the act of 1887-8, under which it is held that the Federal law must be the *foundation and support* of the plaintiff's case and the case is not removable unless this appears from the plaintiff's allegations, regardless of whether or not a Federal law may be relied on in defense.

Tennessee vs. Bank, 152 U. S., 454.

On page 462 of the opinion the court says:

"Congress, in making this change, may well have had in mind the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the Constitution, laws, or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875. 'Looking,' said he, 'to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a Federal court; for if he has pleaded and relied on such defense in the State court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here.' *Railroad Co. vs. Mississippi*, 102 U. S., 135, 144."

While Justices Harlan and Field dissented in this case the doctrine of the majority has been since repeatedly affirmed by the Supreme Court.

See *Great Northern vs. Alexander*, 246 U. S., 276, and cases cited.

The opinion and judgment in the 246 U. S. is unanimous. It is settled, therefore, that a case non-removable as arising

under the laws of the United States cannot be converted into a removable case either by the pleadings or evidence of the defendant, or even by an order of the court upon any issue tried upon the merits.

In the case of *The State of Arkansas vs. K. & T. Coal Company*, 183 United States, pages 185, 188, the court says:

"We inquire, then, if the cause was removable because arising under the Constitution or laws of the United States.

"The general policy of the act of March 3, 1857, as corrected by the act of August 13, 1888 (24 Stat., 552, c. 373; 25 Stat., 433, c. 866), as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the circuit courts. Those cases, and those only, were made removable under section two, in respect of which original jurisdiction was given to the circuit courts by section one. Hence it has been settled that a case cannot be removed from a State court into the circuit court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. *And moreover that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a State, in conflict with the Constitution.*" (Italics ours.)

We find the same principle in *Williams vs. First National Bank*, 216 United States, 582, 594:

"The contention that the cause of action arose under the Constitution or laws of the United States is plainly untenable. Recovery by the bank was in no wise predicated upon any right conferred upon it, or its assignor, to contract, as was done, and the fact that the makers of the note relied for their defense upon provisions contained in certain statutes as establishing that the transaction upon which the right to recover was based was prohibited by law, *would only demonstrate that the suit could not be maintained at all*, and not that the cause of action arose under the Constitution or laws of the United States. *Arkansas vs. Kansas & Texas Coal Co.*, 183 U. S., 185, 190."

A suit arises under the law that creates the cause of action.

Hence it is held that a suit based on a threat to sue under the patent law is not in itself a suit under the patent law, and hence is not one of which the Federal courts have jurisdiction, either originally or by removal, on the ground that it arises under a Federal law.

American Well Works vs. Layne, 241 U. S., 257.

"A suit for damages to business caused by a threat to sue under the patent law is not in itself a suit under the patent law, of which the State courts cannot take jurisdiction.

"Of course the question depends upon the plaintiff's declaration. *The Fair vs. Kohler Die Co.*, 228 U. S., 22, 25.

"It is evident that the claim for damages is based upon conduct, or, more specifically, language, tending to persuade the public to withdraw its custom from the plaintiff and having that effect to its damage. Such conduct having such effect is equally actionable whether it produces the result by persua-

sion, by threats, or by falsehood, *Moran vs. Dunphy*, 177 Massachusetts, 485, 487, and it is enough to allege and prove the conduct and effect, leaving the defendant to justify if he can. If the conduct complained of is persuasion, it may be justified by the fact that the defendant is a competitor, or by good faith and reasonable grounds. If it is a statement of fact, it may be justified, absolutely or with qualification, by proof that the statement is true. But all such justifications are defenses and raise issues that are no part of the plaintiff's case. In the present instance it is part of the plaintiff's case that it had a business to be damaged; whether built up by patents or without them does not matter. It is no part of it to prove anything concerning the defendant's patent or that the plaintiff did not infringe the same—still less to prove anything concerning any patent of its own. The material statement complained of is that the plaintiff infringes—which may be true notwithstanding the plaintiff's patent. That is merely a piece of evidence. Furthermore, the damage alleged presumably is rather the consequence of the threat to sue than of the statement that the plaintiff's pump infringed the defendant's rights.

"A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact—that the defendant has a patent which is infringed. What makes the defendant's act a wrong is its manifest tendency to injure the plaintiff's business and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. *A suit arises under the law that creates the cause of action.* The fact that the

justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. If the State adopted for civil proceedings the saying of the old criminal law, the greater the truth the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defense if the statement was made from disinterested malevolence. Rev. Laws, c. 173, sec. 91. The State is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States."

It is not enough that in the progress of litigation a question under the laws of the United States would arise, since that does not show that the *plaintiff's action derived its life* from these laws.

L. & N. vs. Mottley, 211 U. S., 149.

Taylor vs. Anderson, 234 U. S., 74.

In re Winn, 213 U. S., 458:

"It is a settled interpretation of the laws that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of *his own cause of action* shows it is based upon those laws or on that Constitution. It is not enough if it appears the defendant may find in the Constitution or laws some ground of defense."

Kansas vs. A., T. & S. F. Ry., 77 Fed., 339:

In this case Judge Foster, of the District Court of Nebraska, concurred in by Circuit Judge Thayer, held that in

a case of importance it is commendable in counsel to put in his bill all the law and facts, in order that when he calls upon the court to consider the case, he will have put the court frankly and freely in possession of all the facts and all the law that will have any bearing upon it.

Judge Foster says:

"The attorney general, with a fairness commendable in an officer presenting to the court a case of importance to the State, and to the rights of individuals and corporations, has set forth in full in the amendments to the petition all material facts touching this proceeding. In addition to the averments necessary to bring the case within the provisions of the act of legislature that more than 20 per centum of the stock of the defendant is owned and held by non-resident aliens, etc., he has set forth and cited the act of Congress of March 3, 1863, granting lands to the State of Kansas in trust for the Atchison, Topeka & Santa Fe Railroad Company, and imposing certain duties and obligations upon the railroad company to the General Government in the transportation of troops and property of the United States."

St. Paul vs. St. Paul (8 C. C. A.), 68 Fed., 2, rules that:

"Whether a case begun in a district court is one arising under the Constitution or a law or treaty of the United States in the sense of the jurisdictional statute (Judicial Code, sec. 24), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the declaration, unaided by anything alleged in anticipation or avoidance of defenses which may be interposed by defendant. 197 Fed. Rep., 383, affirmed."

The case of *Bailey vs. Mosher*, 74 Federal, 15, is very instructive and pertinent:

"An action against directors of a national bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the Comptroller of the Currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the Constitution or laws of the United States, of which the Federal courts have jurisdiction, either originally or by removal.

"SHIRAS, *District Judge*:

The exhibits attached to the petition show that the written statements declared on are reports of the condition of the Capital National Bank made by the defendants, as officers and directors of the bank, under the statutes of the United States and regulations of the Comptroller of the Currency. The defendants, appearing in the State court, filed a petition for the removal of the case into this court upon the ground that the controversy was one arising solely under the provisions of the Constitution and laws of the United States, and was therefore removable into the Federal court, regardless of the fact that the plaintiff and defendants were citizens of the same State. The State court refused to grant an order of removal, but defendants caused a transcript of the record to be filed in this court, and the case is now before this court upon a motion to remand.

"It is now well settled that under the provisions of the act of 1887, as amended by the act of 1888, a case cannot be removed from a State to the Federal court, upon the ground that the controversy is one

arising under the Constitution and laws of the United States, unless it is made clear upon the face of the petition or bill filed by the plaintiff that in fact the controversy sought to be adjudicated is one arising under the Federal Constitution or statutes.

"*Metcalf vs. Watertown*, 128 U. S., 586; 9 Sup. Ct., 173.

"*Mining Co. vs. Turek*, 150 U. S., 138; 14 Sup. Ct., 35.

"*Tennessee vs. Union & Planters Bank*, 152 U. S., 454; 14 Sup. Ct., 654."

"From the ruling made by the court of appeals for this circuit in *Bailey vs. Mosher*, 11 C. C. A., 304; 63 Fed., 488, it follows that actions based upon the express provisions of the banking act present controversies arising under the laws of the United States, but the same are only maintainable, after a bank has gone into insolvency, in the name of the receiver. In *Hayden vs. Thompson*, 17 C. C. A., 592; 71 Fed., 60, it was furthermore ruled by the same court that a person legally injured by the wrongful acts of the officers and directors of a national bank, and which acts create causes of action under the principles of the common law, may count on the common-law liability for damages caused him. Actions of this character, however, would not present controversies arising under the laws of the United States, and of them the Federal courts could not have jurisdiction, either originally or by removal, if they were between citizens of the same State. The petition in the case now before the court is clearly based, not upon the provisions of the national banking act, but upon a liability claimed to arise under the principles of the common law; and, as the requisite diversity of citizenship does not exist to justify a removal on that ground, it must be held that the State court rightfully refused to order a removal of the case."

Settled Principles.

The following postulates pertinent to the jurisdiction of the United States courts have been definitely established:

(1) The jurisdiction of the courts of the United States other than the Supreme Court is limited in the sense that they have no jurisdiction other than that conferred by the Constitution and laws of the United States. The presumption is that a cause is without such jurisdiction unless the contrary affirmatively appears. It is not sufficient that jurisdiction be inferred argumentatively from averments in the pleadings but the averments must be positive. *Hanford vs. Davies*, 163 U. S., 273, and cases cited.

(2) The judicial power of the United States as defined in the Constitution is dependent, first, on the nature of the case, and second, on the character of the parties. *Bank vs. Deveau*, 5th Cranch, 61.

(3) The Supreme Court of the United States is created by the Constitution and draws its jurisdictional power directly from that instrument and the same can neither be enlarged nor contracted by any act of Congress. Hence from the beginning the Supreme Court has had appellate jurisdiction over all causes arising under the Constitution and laws of the United States.

(4) The inferior courts are not clothed with jurisdiction over causes arising under the Constitution and laws of the United States except by virtue of some act of Congress specifically vesting such jurisdiction over such causes in such courts.

(5) Immediately following the Civil War the jurisdiction of the inferior courts of the United States was greatly enlarged by Congress (act of July 27, 1866, chap. 288; act of July 27, 1868, chap. 255), and by the Judiciary Act of 1875, jurisdiction in said courts over all cases arising under the Constitution and laws of the United States was broadly granted, and the same act provided for the removal of any such cause in case it involved the Constitution and Laws of the United States in connection with the defense thereof. At this time by virtue of the provisions in the National Bank Act the trial courts were given jurisdiction over all suits by and against National Banks through express enactment, and any Federal corporation could remove a case brought against it in a State court upon a sworn petition setting forth that the defense arose under the Constitution and Laws of the United States.

(6) Shortly after the Judiciary Act of 1875 Congress announced its policy to contract the jurisdiction of the inferior courts of the United States, the first enactment along this line being found in the National Bank Act of 1882, repealing previous provisions of the law authorizing National Banks to sue and be sued in the Federal courts and to remove cases against them from the State courts into the Federal courts solely on the ground of their federal incorporation. The next expression of Congress disclosing this policy is found in the Judiciary Act of 1887 (as corrected in 1888) when a general and fundamental change in the law affecting the jurisdiction of the inferior courts of the United States was effected by withdrawing the right of removal based upon the defense involving the Constitution or Laws

of the United States, and providing that cases could be removed only where primary jurisdiction would have originally attached had they been brought by the plaintiffs in the Federal courts. This act has been construed to require that the allegations of the plaintiff, wholly independent of the defense and notwithstanding the defense may be anticipated as involving the Constitution and Laws of the United States, must show that the plaintiff's *cause of action itself* arose under the Constitution or Laws of the United States. *Louisville & Nashville Railroad vs. Motley*, 211 U. S., 149, and kindred cases; *Taylor vs. Anderson*, 234 U. S., 74; *In re Winn*, 213 U. S., 458.

(7) Prior to the enactment of the statutes immediately following the Civil War vesting jurisdiction in the inferior courts of the United States over causes arising under the Constitution and Laws of the United States, the mere fact that a corporation was created by an act of Congress did not operate to confer jurisdiction over cases by and against it in the absence of express provisions in its charter vesting jurisdiction over cases by and against it in the courts of the United States. *Bank vs. Deveau*, 5th Cranch., 61. Fully reaffirmed in *Bank vs. Martin*, 5 Peters, 479, and in *Texas & Pacific R. R. vs. Bankers' Trust Company*, 241 U. S., 295.

(8) If, however, notwithstanding Congress had not conferred jurisdiction over cases arising under the Constitution and Laws of the United States as a general class of cases, it created a corporation and expressly authorized it to sue and be sued in the United States courts, jurisdiction was thereby granted over such cases. *Osborn vs. Bank*, 9 Wheat., 738.

The foregoing postulates support the following conclusions:

(1) Broadly speaking, prior to the Judiciary Act of 1875 expressly conferring jurisdiction in the inferior courts of the United States over causes arising under the Constitution and Laws of the United States, the mere fact of Federal incorporation without more did not operate to vest jurisdiction in such courts over suits by and against such Federal incorporation.

(2) Between 1875 and the Second National Banking Act (of 1882) the mere fact that a corporation was created by act of Congress vested primary jurisdiction in the Federal courts over all suits brought by it *as plaintiff*, and, upon removal, over all suits brought against it. It is very doubtful, and is irrelevant to the present discussion to determine, whether or not during this period primary jurisdiction was vested in the United States courts over cases brought against Federal corporations wherein the cause of action itself was not founded upon the Constitution and laws of the United States.

(3) Between 1882 and the Judiciary Act of 1887-8 National Banks were taken out of the class of Federal corporations entitled to invoke the jurisdiction of the United States courts by reason of the provisions of the National Banking Act of 1882, but the right to invoke such jurisdiction by all other Federal corporations continued during this period.

(4) Since the Judiciary Act of 1887-8 primary jurisdiction of the inferior courts of the United States, if based upon Federal incorporation of one of the parties thereto, is restricted to causes in which such Federal corporation is the

plaintiff, and if such a suit is brought against a Federal corporation in a State court it is not removable to the United States court on the ground that the defendant is a Federal corporation.

Since jurisdiction in the case at bar does not involve diversity of citizenship, discussion of jurisdiction dependent on the character of the parties may be laid on one side.

The first general discussion of the foundations of jurisdiction over causes arising under the Constitution and laws of the United States is found in the decisions of this court as announced by Chief Justice Marshall in the three cases of *Bank vs. Deveaux*, 5 Cranch., 61; *Osborn vs. Bank*, 9 Wheat., 738; and *Bank vs. Martin*, 5 Peters, 479. The effect of the decision in *Osborn vs. Bank* has been misunderstood or loosely and inaccurately stated in subsequent cases purporting to follow it. Insofar as it involved the interpretation of the charter of the Second Bank of the United States it is very simple, namely, that since this charter expressly authorized the bank to sue and be sued in the United States courts, jurisdiction over such suits was thereby vested in such courts *by reason of the nature of the case*. The charter of the bank being a law of the United States was necessarily involved in the act of bringing the suit. It must be remembered that in the *Osborn* case, the Federal corporation, namely, the Second Bank of the United States, was the plaintiff, and the principles laid down in the *Osborn* case were not announced as controlling cases in which a Federal corporation was a defendant. That question was not before the court, and any expression in the opinion purporting to deal with that question would necessarily be obiter. The chief difficulty confront-

ing the court in the *Osborn* case was to determine whether or not the grant to this Federal corporation of the right to sue and be sued in the United States court was a constitutional enactment. The great Chief Justice found it necessary to elaborately develop this question and finally decided it in favor of the constitutionality of the act, the basis of the decision being that Congress could draw out of the great reservoir of judicial power, dependent on the nature of the case, as involving a law of the United States, to any extent it saw fit; and that since the charter of the bank was a law of the United States, and since the very existence of the bank sprang from that law, and since the filing of a suit was but the exercise of one of the functions of this corporation derived from said law,—a suit brought by it necessarily arose under a law of the United States regardless of the other details of the action, and since judicial power was delegated in the Constitution over all cases arising under the laws of the United States, Congress could, by such an enactment, specifically clothe the inferior court with that power. The principle underlying this conclusion was that the investment of appellate jurisdiction in the Supreme Court over cases arising under the Constitution and laws of the United States justified the exercise of primary jurisdiction in the lower courts as a basis of ultimate appeal to the Supreme Court, and that, if the case arose under a Federal law by virtue of its creation of the corporate plaintiff, jurisdiction attached to decide all collateral or subsidiary questions involved in the case. The reasoning of the decision is as follows:

Judicial power is delegated under the Constitution over cases arising under that Constitution or laws passed pur-

quant thereto. That jurisdiction is to be passed on to all the courts of the United States, outside of the supreme court, solely through the instrumentality of acts of Congress. Congress acted when it expressly authorized the Second Bank of the United States to sue and be sued in the Courts of the United States, contradistinguished from its general grant of corporate power to the First Bank of the United States to sue and be sued in courts of record everywhere. Inasmuch as every power and capacity of the bank is derived from a law of the United States, all suits brought by it arise under such law to the extent of conferring primary jurisdiction, and all collateral and subsidiary questions are carried into the jurisdiction of the court by reason of the fundamental fact that no suit at all could be brought except for the acts of Congress creating the plaintiff. The full extent, therefore, to which the Osborn case goes as an authority is that, jurisdiction over cases arising under the Constitution and laws of the United States having been granted to the inferior courts of the United States, a Federal corporation as plaintiff cannot bring a suit that does not arise under a Federal law, and hence, primary jurisdiction over it vests in the United States court for all purposes. In the light of *Louisville & Nashville Railroad co. v. Motley* and kindred cases, it is asserted with confidence that jurisdiction of a suit *against* a Federal corporation not specifically authorized to sue and be sued in the United States courts is not a case within the primary jurisdiction of said courts and never has been within such jurisdiction. Such a case was removable under the Judiciary Act of 1875, if the conditions of that act were met, but this right was taken away by the Judiciary Acts of 1887-8. At no time in the his-

tory of this Government has original primary jurisdiction ever been vested in the inferior courts of the United States where the *plaintiff's cause of action* did not arise under (in the sense that it was founded upon) the Constitution and laws of the United States, independently of the fact that the defendant in the case was a Federal corporation.

Opinion of the Lower Court on Jurisdiction.

In upholding the jurisdiction of the United States court in the case at bar the opinion of the circuit court of appeals (Transcript, page 120), dismisses the subject of jurisdiction based upon the mere existence of a Federal corporation as a party to the case, although a defendant, with the paragraph that "Unless a long line of supreme court decisions in which jurisdiction was sustained upon this ground without reference to the position of the corporation in the line-up of the parties be disregarded," original jurisdiction of the cause of action would have attached had the suit been originally brought in the District Court of the United States. It is not surprising that the judges of the court of appeals, and of the trial court below, should have declined the task of distinguishing or explaining previous decisions of this great court.

This court itself, however, will not be deterred from a re-examination of its former decisions in order to reconcile them with the mandatory provisions of the statute as now crystallized in section 24 of the judicial code, the necessity therefor arising in order to decide the specific question now for the first time presented to this court upon the record. It may not be amiss to quote from one of the earlier cases

decided in the 5th Peters, page 190, *Ex parte Crane*. Although this language is found in a dissenting opinion it announces a doctrine and a policy which is inherently sound and in consonance with the history of this court.

"Though the question of jurisdiction may not be raised by counsel, it can never escape the attention of the court; for it is one which goes to the foundation of their authority, to take judicial cognizance of the case. If they cannot, in the appropriate language of the law, hear and determine it, the cause is *coram non judice*, and every act done is a nullity. If I take this case into judicial consideration, this is an assumption of jurisdiction that necessarily results from a decision whether this is or is not a proper case for a *mandamus*; for the court hears and determines the motion on its merits. Their refusal to grant the motion is not on the ground that they have not power to consider it, but that on consideration they reject it. This is as much an exercise of jurisdiction as to issue the writ; as by examining the grounds of the motion the court assume the power to decide on it, as the justice of the question may seem to require. In my opinion, no new question of jurisdiction ought to be acted on without an inquiry into the power of this court to grant the motion or to issue the process. The silent uncontested exercise of jurisdiction may induce the profession to claim it as a right founded on precedent, though the judgment of the court may never have been given on the question of power, or their attention have been drawn to it by the counsel."

This citation is made in support of the obvious conclusion that where the supreme court has entered judgment in a case without the question of its jurisdiction, or the jurisdiction

of the lower court, being raised, the fact of its decision is not to be taken as authority in favor of the existence of jurisdiction, in case jurisdiction had been challenged. The fact that in former cases this court has finally decided the questions involved on the merits, and the jurisdiction of the court was not questioned by either side, *cannot be cited as authority* in favor of the existence of rightful jurisdiction in such cases had the question of jurisdiction been made on the record.

In the spirit of this policy the attention of the court is respectfully invited to the following:

Comment on Previous Cases.

Texas & Pacific Railroad Co. vs. Cody, 166 U. S., 606.

This case is most strongly relied upon by appellees. It arose in this way. Cody sued the railroad in a State court alleging it to be a Texas corporation. Defendant removed the case on the ground that the defendant was a Federal corporation. No motion to remand the case was made. The jurisdiction of the Federal court was not challenged by the plaintiff. After the case was tried and lost in the Federal court, the railroad itself raised the question of jurisdiction of said court obviously in a desperate effort to rob the plaintiff of the results of his victory. It is to be noted that the railroad itself had invoked jurisdiction of the United States court based upon an issue of fact as to the character of the defendant corporation, the plaintiff having alleged it to be a corporation of the State of Texas. The question now before this court that jurisdiction did not attach merely because the defendant was a Federal corporation was not hinted at in this record.

The correctness of the removal of the case was affirmed on the authority of the removal cases in the 115 U. S., 1, but ignoring altogether the fact that between the decision of the removal cases and the decision of the Cody case a great change occurred in the judiciary act brought about by the amendment and re-enactment of the act of 1875 in the act of 1887-8, so clearly pointed out in other decisions of this court. Under this distinction the right of removal under the act of 1875, because the defense was supported by a law of the United States, was entirely removed by the act of 1887-8. This distinction was wholly overlooked in the Cody case both by court and counsel. The right to make an issue between the defendant and the plaintiff as to the genealogy of the railroad company was allowed by analogy to issues of fact permitted on petition to remove cases where jurisdiction depends on diversity of citizenship. On this point the court said:

"Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but he cannot cut off defendant's constitutional right as a citizen of a different State than the plaintiff, to choose a Federal forum, by omitting to aver, or mistakenly, or falsely, stating, the citizenship of the parties." Thus analyzed, it is perfectly obvious that, notwithstanding jurisdiction was *exercised* to the final conclusion of the Cody case, the basis of *existence* of jurisdiction over it, as a case arising under the laws of the United States, was wholly overlooked. As a matter of fact it did not arise under the laws of the United States. It was a case based upon the breach of legal duty to exercise diligence to prevent injury to the plaintiff. That duty rested upon all people, natural and corporate, under the common law of England of

force in the colonies even before the birth of the Federal Government. Unless it can be said that Congress could rightfully empower a corporate creature of its making to be guilty of negligence without incurring the consequence thereof, it cannot be said that a suit against the Federal corporation, the basis of which is negligence, makes the plaintiff's action for damages thus inflicted depend upon the provisions of the charter of the corporation guilty of such negligence. While the *exercise* of jurisdiction in this case is a circumstance that must be considered in now reascertaining and restating the basic principles of original jurisdiction of the Federal courts, the Cody case cannot be authority against the position now taken by appellants. While the inferior courts may not feel authorized to disregard the *fact* of the exercise of this jurisdiction, the Supreme Court will not be influenced by it in the case now before the court where that question is made and must be decided.

In order to comprehensively consider the whole question it is necessary to advert to some of the earliest cases on the general subject of jurisdiction of the United States courts.

Earlier Cases.

Beginning with the original Judiciary Act of 1789, jurisdiction dependent on the nature of the case was enlarged from the single class of cases involving controversies between citizens of the same State claiming lands under grants from different States, provided for in that act, to all cases involving the Constitution and laws of the United States, whether in against it, provided for in the Judiciary Act of 1875. From support of the plaintiff's cause of action or of the defense

the broad expanse of these foundations of jurisdiction, Congress soon began to recede, under a well-defined policy to contract the primary jurisdiction of the Federal courts. The first Congressional expression of this policy is found in section 4 of the National Bank Act of 1882, wherein all national banks were forbidden the United States courts unless jurisdiction attached as in case of State corporations or private citizens. The next Congressional expression of the policy is found in the Judiciary Act of 1887-8 wherein the foundation of jurisdiction dependent on the nature of the case is restricted to cases arising under the laws of the United States in the sense that plaintiff's cause of action must be originated in, or be founded upon, or arise directly from a law of the United States. The defendant may rely upon a law of the United States to defeat the plaintiff, but the only effect of thus injecting a Federal law into the case is to raise a Federal question that will clothe the Supreme Court with power to review the final decision of the court of last resort of the State where the case is tried.

From the time of the opinion of Marshall, Chief Justice, in *Osborn vs. Bank* down to date the basis of primary jurisdiction of the United States courts, over cases in which a Federal corporation is a party is placed upon the fact that such a corporation derives all its faculties and capacities from the law of the United States under which it is incorporated. Hence, as the great chief justice points out, jurisdiction of all such cases is dependent at last upon the nature of the case, and not on the character of the parties.

But since the Judiciary act of 1887-8, where primary jurisdiction of the United States courts is dependent on the nature of the case, it must appear from the plaintiff's own

statement of it that his case arises directly under the laws of the United States in the sense that it derives its life therefrom and is founded thereon.

The fact that the *defendant* is a federal corporation need not be pertinent on the question of primary jurisdiction whatever may be its bearing upon the appellate jurisdiction of the Supreme Court of the United States to review the final adverse decision of the Supreme Court of the State.

This conclusion requires a construction of section 4 of the act of 1887-8 that will limit the exclusion of National Banks from such jurisdiction, because of their Federal incorporation, to cases in which they are parties and in which the cause of action is *not* founded on a law of the United States.

In such cases primary jurisdiction of the United States courts is denied, although the National Bank may be the plaintiff, and dependent on its charter for the power to sue in any court. But Federal corporations other than National Banks can still invoke the primary jurisdiction of the Federal courts, *provided they are plaintiffs*, because, *and only because*, all their rights of action must in the nature of the case rest upon the law of the United States that gave them being, and bestowed upon them all the faculties and capacities they possess.

The large number of National Banks (now nearly 8,000) made it necessary, in pursuance of the policy of restricting the jurisdiction of Federal courts, to bar the doors of said courts against them. The same policy resulted in taking out Federal railroads under the act of 1915, because of the large number of cases arising out of their operation. But, so far, Congress has not considered Federal corporations of other classes sufficiently numerous to require their exclusion *as plaintiffs* in the Federal courts.

All Federal corporations of all classes are necessarily excluded from such primary jurisdiction in *the capacity of defendants* unless the cause of action against them derives its life from a law of the United States. While in some of the cases (such as *Bankers Co. vs. R. R.*, 192 U. S., 385), the Supreme Court has used language, *arguendo*, appearing to conflict with this conclusion, the interpretation of the act of 1887-8 demanded by the questions involved in *L. & N. R. R. vs. Mottley*, and kindred cases cited in the brief, supports the conclusion beyond all controversy. Hence it is, that whether or not the Federal Reserve Bank of Atlanta is *ejuedem generis* as any other National Banking Association, its presence as a party defendant in the case at bar, and the possible necessity of construing the Federal Reserve Act that created it, and construing it in such a way as to defeat the cause of action of the plaintiffs, can have no bearing on the question of primary jurisdiction now under discussion.

This view of the effect produced by the act of 1887-8 on the primary jurisdiction of Federal courts does not appear to have occurred to court of counsel in any of the decided cases, but is clearly deducible from the cases cited.

In *Bank vs. Devaux*, 5 Cranch, 61, the basic question herein involved was first discussed by the Supreme Court, Marshall, Chief Justice, delivering the opinion.

He said:

"The judicial power of the United States, as defined in the Constitution, is dependent, 1st—On the nature of the case; and 2nd—On the character of the parties.

By the judicial act, the jurisdiction of the circuit courts is extended to cases where the constitutional rights to plead and be impleaded, in the courts of the

Union, depends on the character of the parties; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State, claiming lands under grants from different States."

Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the Judicial act, the Bank of the United States had not the right to sue in that court, upon the principle that the case arises under a law of the United States."

The plaintiff then contended that the incorporating act conferred jurisdiction because it authorized the Bank of the United States to sue and be sued in courts of record.

The court held that this was a power, if not incident to a corporation, that is conferred by every incorporating act, and is not understood to enlarge jurisdiction of any particular court. This ruling has been re-affirmed in the recent case of *Texas Pacific R. R. vs. Bankers Trust Company*, 241 U. S., 295. The court was of the opinion that no right to sue in the Federal courts was conferred on the First Bank of the United States by its act of incorporation.

The doctrine of this case is re-stated by Chief Justice Marshall in the case of *Bank of the United States vs. Martin*, 5 Peters, 479, which case is subsequent to *Osborn vs. Bank*, 9 Wheaton, 738.

Applying the provisions of the Constitution (which make jurisdiction of the Federal courts dependent, first, on the nature of the case, and second, on the character of the parties), to the necessary effect of the judiciary act of 1887-8 as construed, the conclusion seems to be inevitable that where a Federal corporation is the defendant in a case where

the plaintiff's rights are not dependent upon, and do not arise from, some law of the United States, jurisdiction does not attach merely because the party defendant is a corporation created by an act of Congress.

In *Osborn vs. U. S. Bank*, 9 Wheaton, 738, the opinion delivered by Chief Justice Marshall in the case of *Bank of U. S. vs. Devaux*, above commented upon, is distinguished from the *Osborn* case because of the fact that the *Devaux* case and the subsequent *Martin* case arose under the charter of the First U. S. Bank, whereas the *Osborn* case arose under the charter of the Second U. S. Bank. The first charter conferred power to sue and be sued in courts of record or any other place whatsoever, and in the *Devaux* case this language is held to be too general to confer jurisdiction on the courts of the United States, same being courts of limited jurisdiction and dependent upon express Congressional authority for the existence of jurisdiction. The charter of the Second Bank of the United States authorized that bank to sue or be sued in any court of record of the United States or either of them. The language of the charter of the Second Bank was held to be an express grant of jurisdiction to the Federal courts.

The language of the Federal Reserve Act nowhere expressly confers on Federal Reserve Banks the right to sue and be sued in the courts of the United States as distinguished from any other court.

The power of Congress thus to confer jurisdiction on the inferior federal courts of cases brought by and against the banks of the United States is analyzed and discussed and the power held to exist on the ground that the exercise of any power of the bank was dependent upon its charter, and

when under review by the courts, a law of the United States was involved. The injection of other elements into the case, not dependent upon the law of the United States, did not restrict the jurisdiction to the points actually arising out of the charter, but jurisdiction having attached would be exercised for all purposes.

The case of *Williams vs. First National Bank of Paris Valley*, 216 U. S. 582, clearly establishes the fact that although the plaintiff is a national bank created by an Act of Congress, as to which Act it must turn for even the right to take the obligation sued on, that fact does not make the case arise under the laws of the United States. While the specific question is not raised in that case, based on the charter of the bank, the Court held that there was no federal question involved in the case that would authorize writ of error to the Supreme Court from the decision of the Court of last resort of the State but for the questions raised on application for removal of the case and the denial thereof.

That the Judiciary Act of 1887-8 operates upon the distinction existing between the party and the cause has been decided in almost every case involving the interpretation of that act since its enactment, the most striking application of it being the case of *Texas & Pacific R. R. vs. Bankers' Trust Company*, *supra*.

That was a suit to foreclose a mortgage securing the bonds of this Federal railroad corporation. Certainly it could have no power to issue bonds and secure them by mortgage on its property unless the same was expressly conferred in its charter.

The express legislation in the Act of January, 1915, applicable to railroads incorporated under acts of Congress is

held to have rendered immaterial the provisions of the charter of the company as related to the question of jurisdiction. Is not this same result legally and necessarily reached by the Act of 1887-8 in so far as it confers original jurisdiction in the inferior Federal courts, based on the nature of the cause rather than the character of the party, *as to all cases in which the Federal corporation is the party defendant in the case?* The only law of the United States necessarily involved in such a case is one conferring power upon the defendant Federal corporation to be served and brought into court as a party litigant. The foundation of the cause of action, when the party thus comes before the court, may be, and in the case at bar is, wholly independent of any law of the United States. The rights sought to be protected in the case at bar have been invaded by the joint action of a Federal corporation and the natural persons who occupy relations to it. This invasion of these rights may be justified under the provisions of the Federal law embodied in the charter of the defendant, in which event all relief prayed for would be denied; but certainly it cannot be said that that which destroys the right of recovery in a case is the source of the right sought to be asserted. That is a flat contradiction in terms. And yet, under the all-embracing provisions of the act of 1887-8 conferring original jurisdiction based on the nature of the case, the *sine qua non* is that the plaintiff's cause of action must be founded upon and draw its life from a law of the United States, and this must appear from the plaintiff's own statement of the case.

Montgomery vs. Hernandez, 12 Wheaton, 129.

In *Montgomery vs. Hernandez*, 12 Wheat., 129, a suit was brought in a State court by parties beneficially interested in a bond given to the United States by a marshal to secure the faithful performance of his official duties. The suit was in the names of the beneficiaries, and not in that of the United States for their use. It was insisted that there could be no recovery, because the action should have been prosecuted in the name of the United States; and this was assigned for error in this court. But it was said that "plaintiff in error did not and could not claim any right, title, privilege, or exemption by or under the marshal's bond, or any act of Congress giving authority to sue the obligors for a breach of the condition," and that the court had no jurisdiction of the case on that ground. Again: the same question was presented and elaborately argued in *Henderson vs. Tennessee*, 10 How., 311, decided in 1850. That also was an action of ejectment in a State court, in which the defendant set up an outstanding title in a third person, under an Indian treaty; and there, too, the writ was dismissed. In delivering the opinion of the court, Chief Justice Taney said, "It is true, the title set up in this case was claimed under a treaty; but, to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest.

* * * The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judgment in this case is no obstacle to their assertion of their title in another suit brought by themselves or any person claiming a legal title under them." To the same effect are *Hale vs. Gaines*, 22 How., 149, 160, and *Verden vs. Coleman*, 1 Black, 472.

Mayor vs. Cooper, 6 Wall., 252.

Speaking of jurisdiction, the Supreme Court said in *Mayor vs. Cooper*, 6 Wallace, p. 252:

"As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way. Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal causes. Both are within its scope. Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction. 'A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the right construction of either.'

"The rule applies with equal force where the plaintiff claims a right, and where the defendant claims protection, by virtue of one or the other."

Tennessee vs. Davis, 100 U. S., 257.

In *Tennessee vs. Davis*, 100 U. S., 257, this court, following its decision in *Cohens vs. Virginia*, 6 Wheat., 264, defined the meaning of the expression "cases arising under the Constitution and Laws of the United States" as follows:

"It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States, whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted."

This case arose and was decided between the Judiciary Act of 1875 and the Judiciary Act of 1887-8 and, of course, throws no light on the effect of the latter act upon the subject of the original jurisdiction of the trial courts of the United States. The basis of the decision in *Tennessee vs. Davis* is whether or not a criminal case is removable to a United States court. The court was divided on the subject, *Moss*. Clifford and Field dissenting.

Pacific Removal Cases.

The comments of the court on the scope of *Osborn vs. Bank* (9 Wheat., 738) extend the case beyond its true

scope. The following quotation is taken from Removal Cases, 115 U. C., 1, at page 11:

"We are of opinion that corporations of the United States, created by and organized under acts of Congress like the plaintiffs in error in these cases, are entitled as such to remove into the circuit courts of the United States suits brought against them in the State courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits 'arising under the laws of the United States.' We do not propose to go into a lengthy argument on the subject; we think that the question has been substantially decided long ago by this court. The exhaustive argument of Chief Justice Marshall in the case of *Osborn vs. Bank of the United States*, 9 Wheat., 738, 817-828, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States. That argument was the basis of the decision on the jurisdictional question in that case. The precise question, it is true, was as to the power of Congress to authorize the bank to sue and be sued in the United States courts. The words of its charter were, that the bank should be made able and capable in law to 'sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State courts having competent jurisdiction, and in any circuit court of the United States.' The power to create such a jurisdiction in the Federal courts rested solely on the truth of the proposition, that a suit by or against the bank would be a suit arising under the laws of the United States; for the Constitution confined the judicial power of the United States to these four classes of cases, namely: first, to cases in law and equity, arising under the

Constitution, the laws of the United States, and treaties made under their authority; secondly, to cases affecting ambassadors, other public ministers and consuls; thirdly, to cases of admiralty and maritime jurisdiction; fourthly, to certain controversies depending on the character of the parties, such as controversies to which the United States are a party, those between two or more States, or a State and citizens of another State, or citizens of different States, or citizens of the same State claiming lands under grants of different States, or a State or its citizens and foreign States, citizens or subjects. Now, suits by or against the United States Bank could not possibly, as such, belong to any of these classes except the first, namely, cases in law and equity arising under the Constitution, laws or treaties of the United States; and the Supreme Court, as well as the distinguished counsel who argued the *Osborn* case, so understood it. Unless, therefore, a case in which the bank was a party was for that reason a case arising under the laws of the United States, Congress would not have had the power to authorize it to sue and be sued in the circuit courts of the United States. And to this question, to wit, whether such a case was a suit arising under the laws of the United States, the court directed its principal attention. But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States, it is sufficient for the purposes of Federal jurisdiction if the case necessarily involves a question depending on such Constitution, laws or treaties. The Chief Justice then proceeds as follows:

"We think, then, that when a question to which the judicial power of the Union is extended by the

Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law? Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. * * *

"The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may

choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involved, then, must determine its character, whether those questions be made in the case or not" (pages 823, 824).

"It is said that a clear distinction exists between the *party* and the *cause*: that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of law, a right to sue in the courts of the United States, as give that right to the bank.

"This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law" (page 827).

"If the case of *Osborn vs. The Bank of the United States*, is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof, sustain important relations to the Government of the United States."

The foregoing analysis of the Osborn case was really irrelevant as applied to the case then before the court, the ultimate decision of which turned upon the provisions of the Judiciary Act of 1875 which were materially changed by the act of 1887-8.

The only power under their charters that these Federal railroads had to appeal to was the power to employ counsel and interpose their defenses. The exercise of this power was therefore dependent upon the laws of the United States under which they were created. Thus an ingredient of the defense, *i. e.*, the capacity to make it, was found in the case, which ingredient had its source in a Federal law. Consequently removal under the express terms of the act of 1875 was permissible. It is respectfully submitted that this is the full extent of the decision in the Removal cases, although many expressions in the reasoning of the opinion go further. In so far as they appear to conflict with the present contention they could be persuasive merely, not controlling. But the right of removal solely because a Federal law was involved in the defense of the case was withdrawn by the act of 1887-8. Therefore the reasoning of the opinion in the Pacific Removal cases is superseded by statute.

Source of the Rule Prior to Act 1887-8.

These cases are cited to show the sources of the oft-repeated rule that if a Federal question forms an ingredient in the mass of matter in any case, underlying the right of either plaintiff or defendant, or if the right construction of any Federal law is involved in the correct decision of any right of either plaintiff or defendant, jurisdiction exists either originally or by

removal. This all-embracing rule has been carried over the date of the Judiciary Act of 1887-8, by reference in subsequent cases, without drawing attention to the obvious and radical change in the law that was wrought by that act. It is important that the new rule be announced with the same clearness.

In many of the cases decided since the act of 1887-8 this court has repeated the postulate that a suit arises under the laws of the United States if it appears that some right on which recovery depends will be defeated by one construction or sustained by an opposite construction of the laws of the United States, citing *Osborn vs. Bank* and subsequent cases. But in each of these cases it will be found that jurisdiction obtained on some other ground, and the questions now involved were not considered. See—

Cooke vs. Avery, 147 U. S., 375, 385.

Roberts vs. N. Pac. R. R., 158 U. S., 1, 22:

This was a suit by a Federal corporation as plaintiff to enforce rights vested in it under its Federal charter and jurisdiction of the United States Circuit Court was not questioned. The citation of the *Osborn* case (9 Wheat., 738) to the effect that suits by *or against* a corporation of the United States does not militate against the present argument, because we concede that jurisdiction of the United States courts obtains where a corporation of the United States is plaintiff as it was in *Roberts vs. Northern Pacific R. R. Co.* (*supra*). The citation of the Removal cases (115 U. S., 1) was not pertinent, because the Removal cases were decided under the Judiciary Act of 1875. So, the citation of the *Osborn* case

and the Removal cases in the case of *Ex parte Jones*, 164 U.S., 692, lends no force to them, the question of the existence of original jurisdiction, or of jurisdiction by removal not being involved. The sole question in *Ex parte Jones* related to appellate jurisdiction turning on the ground upon which original jurisdiction was invoked.

Shoshone vs. Rutter, 177 U. S., 505, 510.

The comments of Mr. Justice Brewer (p. 510) on the *Osborn* case include suits by *or against* a corporation of the United States, but the question he was discussing did not involve any distinction between cases *by* such corporations, and cases *against* them, and hence the comment is obiter.

Smith vs. Reeves, 178 U. S., 436, 446.

This case holds that a Federal corporation cannot as plaintiff sue a State in the United States courts without its consent, although, under *Osborn vs. Bank* such a case arises under the Constitution and laws of the United States. Obviously not, because the law prohibits it by the 11th amendment as construed by this court.

It will not be denied, however, that if the position of the parties is reversed and the case arises under the laws of the United States jurisdiction of the United States courts attaches. This is another illustration of the effect on jurisdiction sometimes resulting from the relative position of the parties to the case.

Swafford vs. Templeton, 185 U. S., 487.

Following *Wiley vs. Sinker*, 179 U. S., 58, the Chief Justice based the decision upholding jurisdiction on the fact that the right asserted by plaintiff had its foundation in the Constitution of the United States. In drawing the distinction between the *existence* and the *exercise* of jurisdiction the rule as to jurisdiction of cases brought by Federal corporations is cited, and stated to be that jurisdiction exists of all suits by *or against* such corporations. It is submitted that this is merely *arguendo* and the distinction now sought to be made was not in the mind of the court, and need not have been for the purposes of the illustration made. There is nothing in *Continental National Bank vs. Buford*, 191 U. S., 119, and cases there cited that militates against the present argument. The question of jurisdiction in those cases turned on the Acts of 1882 and 1888 restricting jurisdiction in cases by national banks.

Bankers' Mutual Casualty Co. vs. Minneapolis, &c., Ry. Co.
192 U. S., 371.

This was a suit for the loss of mail matter originally brought in the Circuit Court of the United States, and jurisdiction appeared from the allegations of diverse citizenship. The case went to judgment in favor of the defendant on general demurrer, was affirmed on writ of error by the Circuit Court of Appeals. Writ of error was then taken to the Supreme Court on the ground that the decision of the Circuit Court of Appeals was not final by reason of possibility of upholding jurisdiction on the ground that the case arose under the Constitution and laws of the United States. It is

to be observed, therefore, that the question of primary jurisdiction in the district court, based on the nature of the case, was only collaterally involved. Jurisdiction based on diversity of citizenship unquestionably existed. The whole decision revolved around the right to writ of error from the decision of the Court of Appeals to the Supreme Court. This jurisdiction was held not to exist. The allegations of the plaintiff disclose a number of charges against the defendant Railroad Company under its contract obligations to the United States for carrying the mails, details of which it is unnecessary to elaborate. The effort to involve the regulations of Congress as to carrying mails was based upon the fact that the mail sacks were committed to the custody of an employee of the Railroad Company who had not been sworn in as an official of the Post-Office Department in violation of the postal regulations, and that the Railway Company failed to provide a safe and secure place for the deposit of said mail sacks as required under said regulations.

In analyzing the case, Mr. Chief Justice Fuller eliminated the question of jurisdiction by reason of Federal incorporation of the parties to the case, and in doing so remarked that such a corporation has a right to invoke the jurisdiction of the Federal courts in respect of any litigation it may have except as specially restricted. As this question was not involved in that case, this statement in so far as it conflicts with our present contention, is obiter and may be so treated. In conclusion the Chief Justice stated that the rule is settled that a case does not arise under the Constitution and laws unless it appears from the plaintiff's own statement in the outset that some right on which recovery depends will be defeated by one construction of the laws of the United States,

or sustained by the opposite construction. The cases cited in support of this rule are:

Gulf-Washing, &c., Company *vs.* Keyes, 96 U. S., 199.

Starin *vs.* New York, 115 U. S., 248.

New Orleans *vs.* Benjamin, 153 U. S., 411.

Blackburn *vs.* Portland Gold Mining Co., 175 U. S., 571.

Shoshone Mining Company *vs.* Rutter, 177 U. S., 505.

The first two of these cases were decided before the Judiciary Act of 1887-8. The New Orleans-Benjamin case does not throw any light on the present discussion under its peculiar facts. The other two cases arise under the special interpretation of the acts of Congress relative to mineral lands under which acts full concurrent jurisdiction in both State and Federal courts is allowed, and the cases arising thereunder are not pertinent to the present discussion. It is obvious that the question now made based upon interpretation of the Judiciary Act of 1887-8, when its terms were specifically under examination by this court, as in the case of *L. & N. vs. Mottley* and kindred cases, was not in the mind of the court rendering the opinion in the Bankers' Casualty case now under discussion. It is impossible to reconcile the principle laid down in *L. & N. vs. Mottley* and kindred cases with the rule that a case arises under the laws of the United States if it appears that the plaintiff's right of action will be defeated by a construction of some law of the United States as contended for by the defendant. Certainly Mottley's cause of action based upon the refusal of the L. & N. Railroad to issue him an annual pass would have been defeated by the application to the facts of the absolute prohibition

of the Hepburn amendment to the Interstate Commerce Act absolutely prohibiting the issuance of such a pass. It is true that it might have been argued that the vested contract rights of Mottley could not have been destroyed by the subsequent legislation of Congress without any recourse upon anybody. It is equally true in the case at bar that the destruction of the right to charge exchange as compensation for services rendered in transporting funds would be destroyed by the application of the proviso of the 13th Section of the Federal Reserve Act, if that proviso is construed as the Federal Reserve Bank seeks to construe it. But the question would still remain whether or not such an inherent property right may be thus destroyed. In either case, however, it is a contradiction in terms to say that the cause of action arises under, and draws its life from, the application of the law that immediately extinguishes it. It seems obvious that this court should review cases like the Bankers' Casualty Company vs. Minneapolis, &c., and other cases herein commented upon in which expressions are to be found evidently based upon the interpretation of the law prior to the Judiciary Act of 1887-8, and so harmonize them that hereafter there will be no inconsistency in the application of the provisions of this act relative to primary jurisdiction of the United States courts. It may not be amiss to state the distinction between the law before and after the passage of the Judiciary Act of 1887-8. Before that law was passed the existence of a Federal question anywhere in the case that controlled the result for or against plaintiff or the defendant, might or might not confer jurisdiction, but in all such cases the presence of the Federal question authorized the removal of such cases into courts of the United States.

After the passage of the Act of 1887-8, the presence of a Federal question involved in the defense of the case does not operate to confer primary and original jurisdiction on the courts of the United States, but does authorize a writ of error or appeal to the Supreme Court of the United States from the decision of the Court of last resort of the State in which the suit is brought. This distinction is logical, easily understood, and seems to be demanded by the provisions of this act, and it is submitted that this court should make it perfectly clear notwithstanding the expressions in some of the cases, where the question was not squarely before the court, that implied a contrary view.

Minnesota vs. Northern Securities Co.

The unanimous decision of this court in the case of *Minnesota vs. Northern Securities Company*, 194 U. S., 48, clearly settles the principle for which appellants now contend. That case was represented by some of the ablest lawyers at this bar. It was considered carefully by the court, the opinion being announced by Mr. Justice Harlan and unanimously concurred in. The suit was originally brought by the State of Minnesota and a petition for removal filed by one of the defendants on the ground that it was a suit of a civil nature in equity, and involved the necessary amount and was one arising under the Constitution and laws of the United States. The bond was accepted and the case removed, all preliminary opposition to removal appearing to have been withdrawn on account of some advantages gained in obtaining jurisdiction, *in personam*, over some of the non-resident defendants. When the case reached the Supreme Court the

question of jurisdiction was raised by the court itself, and briefs invited. From these briefs it appeared that both sides deemed the case removable and both sides insisted that this court should consider the merits as disclosed by the pleadings and the evidence. However, as jurisdiction could not be conferred by consent and if the record did not affirmatively show jurisdiction in the lower court, this court very properly held that upon its own motion it must decline to proceed. Jurisdiction by reason of the character of the parties was impossible because the State of Minnesota was the sole plaintiff and is not a citizen within the meaning of the Constitution. The fundamental basis of jurisdiction dependent upon the nature of the case was thus squarely before the court, having been raised by the court itself, and required decision as a condition precedent to any further action in the case. All parties desired to have jurisdiction retained, and briefs of counsel for both sides sought to uphold jurisdiction. The principles decided in that case have never been in any manner modified by the subsequent decisions of this court insofar as we have been able to ascertain. It ought to be final in the conclusions there reached. The case of *Tennessee vs. The Union and Planters' Bank*, 152 U. S., 454, was taken as a starting point because it involved the scope and meaning of the Judiciary Acts of 1887-8. The fundamental change made by this act laid down in the *Tennessee-Bank* case was emphasized in the *Minnesota* case. This change is found to have been in accordance with the general policy of these acts, manifest upon their face and often recognized, to contract the jurisdiction of the trial courts of the United States. The doctrine found in *Chappell vs. Walerworth*, 155 U. S., 102, following the *Tennessee*

Bank case in 152nd, that, unless it appears from the plaintiff's own statement of his claim that his cause of action arises under the laws of the United States, the want of such essential conditions cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. Eight subsequent decisions of this court are then cited on page 64 of the Minnesota case (included in which is *Texas & Pacific vs. Cody*, 106 U. S., 606). Mr. Justice Harlan proceeds as follows:

"These cases establish, beyond further question in this court, the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a State court, as one arising under the constitution or laws of the United States, unless the plaintiffs complaint, bill, or declaration shows it to be a case of that character."

Third Street and Suburban Railway vs. Lewis, 173 U. S., is then quoted from to the effect that if it does not appear at the outset from the allegations of the plaintiff that the suit is one of which the circuit court (now the District Court) at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed. The court then approaches squarely, face to face, the inquiry whether the complaint in that case presented a case arising under the constitution and laws of the United States within the jurisdictional requirements. The real purpose of the suit was to suppress a combination alleged to be in violation, first, of the laws of Minnesota, and, second, of the Anti-Trust Act of Congress. If the relief prayed for had been based solely on the ground that the offending combination was forbidden by the statutes of Minnesota, the Circuit Court of the United States could

not have taken cognizance of the case, for confessedly such a suit could not be deemed one arising under the laws of the United States. The only remaining basis of jurisdiction was the allegation of a combination in violation of the Anti-Trust Act of Congress of July 2, 1890. The court then raises the question whether or not the suit really and substantially, as disclosed by the complaint, involved a violation of the provisions of the Anti-Trust Act. The Anti-Trust Act is then quoted at length and the conclusion reached that the suit was not within the description of any of the suits authorized by that act. The beneficial effects of the Anti-Trust Act were then invoked in behalf of the State of Minnesota, and of its people, alleging that the State owned three million acres of land, the value of which depended in large measure upon free, uninterrupted, and open competition in transportation, and that the development of these lands likewise depended upon such free and uninterrupted competition; that the State owned and maintained at large expense the University, hospitals, public institutions of various kinds, a great portion of the supplies for which must of necessity be shipped over the transportation lines; that the amount of its taxes and the maintenance of its public institutions, and the performance of its governmental functions, depended largely upon the property of the State and the general prosperity and business success of its citizens, and that such prosperity depended largely upon unrestricted competition between the railway companies. This theory was repudiated by the court and the Anti-Trust Act was construed not to be designed for any such uses. The State further alleged that if the holding company was permitted to control the stocks of the competing roads full faith and credit would not be given to the public acts of the State, and, therefore, the case arose under

Article IV of the Constitution on this subject. That this corporate device of a holding company was violative of property rights in Minnesota, and that the Federal Constitution must be so construed as to make the constitutional enactments of Minnesota effective throughout the United States so far as they apply to and effect property rights within the State; that otherwise the policy and laws of the State might be easily evaded. Article IV of the Constitution was held to have no application, as it had nothing to do with the conduct of individuals or corporations, and that to invoke the rule which it prescribes does not make a case arising under the Constitution and laws of the United States. Therefore, it was held that, notwithstanding the allegations above outlined, the cause of action attempted to be set up did not make a case arising under the laws of the United States. By the very act of reaching this decision this court was compelled to carefully examine and authoritatively construe the Sherman Anti-Trust Law and Article IV of the Constitution of the United States, both of which laws under the allegations of the bill were drawn into the warp and woof of the cause of action sought to be asserted, and yet the case was not one (in the face of the allegations requiring this interpretation of Federal laws), arising under the laws of the United States and, therefore, jurisdiction was denied.

Suppose it is true in the case at bar that in the ultimate determination whether or not under the Federal Reserve Act the defendant Reserve Bank has the charter power to undertake the collection of checks (drawn upon non-member banks over which confessedly it has no jurisdiction) if the collection and transportation of the proceeds of such checks involved any expense or outlay on behalf of the Federal Reserve Bank.

If it can do this, it can deprive the plaintiff banks of their inherent and statutory right to charge reasonable compensation for services rendered at the request of the party served; it can thus deprive the appellants of their property rights without due process of law, solely upon the strength of the proviso to section 13 of the Federal Reserve Act; then the plaintiffs' grievance is neutralized and nullified by such an interpretation; it has no cause of action at all. But the proper interpretation and application of this proviso are matters that do not lie at the foundation of the plaintiffs' alleged cause of action, but at the base of the defense of the Federal Reserve Bank. The only possible reply to this settled principle is that the mere fact that one of the defendants in this case owes its artificial existence to an act of Congress makes all cases against it, regardless of their foundation, suits *arising* under the laws of the United States. Is not this a *reductio ad absurdum*? The provisions of the charter of a corporation making it subject to be sued, and therefore in position to be served with process, and therefore bound to obey the lawful judgments of courts thus acquiring jurisdiction over it *in personam*, is a liability, a burden, an obligation, and not a right, or a privilege, or an asset. It is designed to make these artificial creatures obey the law and not a device that may enable them to commit a wrong without punishment. If such a corporation commits an *ultra vires* act it must answer the consequence, and the fact that it is empowered to commit all its acts under and by virtue of its charter cannot give it charter power to commit an unlawful act, or to exercise its lawful powers in an unlawful manner. It is contrary to the genius of our institutions to contend that our legislatures, State or national, ever intended, or had the power, to

confer a charter right to commit a wrong. In a very true sense all wrongful acts of all corporations are inherently and necessarily *ultra vires* their charters. The bill now before this court makes serious charges of reprehensible conduct against this Federal Reserve Bank; that this conduct is not authorized by its charter, but is in direct conflict with its charter as officially interpreted by the Attorney General of the United States in an opinion requested by and furnished to the President of the United States. These charges of wrongful conduct are admitted on this record. The consequences of this conduct are alleged to be a serious invasion of the property rights of the appellants enjoyed under their respective State laws and State charters, and under the common law obtaining in their States. To say that in an effort to assert and preserve these statutory and common-law rights by an attack upon the regularity and legality of these oppressive measures of the defendants makes plaintiffs' cause of action arise under the very laws complained of as destructive of their rights, is a paradox no court should adopt.

In re Dunn, 212 U. S., 374:

This is one of the decisions of this court where jurisdiction based solely on the fact that one of the defendants was a Federal corporation was upheld. The case originated in a petition for mandamus to compel a district judge of the United States to remand the case, and the writ was denied and the petition dismissed. There are two reasons why this decision is not controlling over the question now presented:

First. The question was not presented on the record.

Second. The use of the writ of mandamus for any such purpose, although subsequently followed *In re Winn*, 213 U. S., 458, was condemned in *Ex parte Harding*, 219 U. S., 363.

The language of the syllabus in the case last cited that "it is the duty of this court to reconcile decisions and, in order to enforce the correct doctrine, to determine which rest upon the right principle and to overrule and qualify those conflicting therewith," applies with peculiar aptness to the case at bar, in which for the first time the principles underlying original jurisdiction of the trial courts of the United States as found in the Judiciary Act of 1887-8 with respect to suits *against* Federal corporations are specifically raised on the record and their proper interpretation for the first time invoked.

That the effect of the act of 1887-8 upon the existence of jurisdiction when solely dependent on the fact that a Federal corporation is a defendant has never been considered by this court, is obvious. It is respectfully requested that previous cases be reviewed and harmonized with the effect of the present statute upon the earlier cases (*Deveaux* and *Osborn*) in order to prevent further misconception which must otherwise continue to exist with respect to the rule laid down in the act of 1887-8.

In *Shulthis vs. McDougal*, 225 U. S., 561, the court appears to assume that if the defendant gas company incorporated under the laws of the United States in force in the Indian Territory was a Federal corporation jurisdiction would have existed; but the decision is that it was not a Federal corporation and that was the only question decided as to jurisdiction.

The question now before the court was not hinted at. The Shulthis case reiterates that jurisdiction based on the nature of the case must appear from the plaintiffs' allegations unsupported by any possible defense arising under Federal law, and unbuttressed by argumentative inference, and that such allegations of the plaintiff must disclose that the plaintiff's case, independently of the possible defenses to be interposed, really and substantially involves a controversy respecting the validity, construction, or effect of such law, upon the determination of which the result depends.

The jurisdiction of the Federal court by removal from the State court in the case of *Texas & Pacific Ry. vs. Hill*, 237 U. S., 208, was not attacked on the ground that the plaintiff's cause of action did not arise under a law of the United States. That was taken for granted and jurisdiction upheld on other grounds.

Northern Pacific Railroad vs. Amato, 144 U. S., 465.

The question in this case involved the jurisdiction of the Supreme Court of the writ of error from the judgment of the circuit court of appeals, and jurisdiction was entertained on the ground that the original jurisdiction obtained by removal from the State court of New York to the United States circuit court was dependent on the fact that the defendant corporation was created by an act of Congress and that, therefore, the suit arose under a law of the United States without reference to the citizenship of the plaintiff, and that consequently the judgment of the court of appeals was not final and writ of error to the Supreme Court would lie. In this case the original jurisdiction of the United States circuit

court was not challenged by the plaintiff, nor in any manner objected to by the defendant. While it is true that jurisdiction dependent upon the nature of the case cannot be conferred by waiver or consent, it is equally true that in this case, although brought subsequent to the Judiciary Act of 1887-8, the attention of the court was not called to the questions now raised in the case at bar, and the effect of the decision in the absence of consideration of the questions now under discussion ought not to be controlling. If our present position is sound, then the decision in *Northern Pacific vs. Amato* should be reversed, or so far modified as to conform to the correct interpretation of the Act of 1887-8 as it has been construed by this court, to wit:

That to make the case cognizable under the original jurisdiction of the trial courts of the United States, where such jurisdiction is dependent on the nature of the case, it must appear from the plaintiff's own allegations that the cause of action arises under the Constitution and laws of the United States.

The Position of the Parties May Affect the Jurisdiction of the Court.

Slight consideration demonstrates that the position of the parties on the record may affect the jurisdiction of the courts of the United States, even in cases where jurisdiction is dependent solely on the subject-matter of the case and not upon the character of the parties.

As early as the Judiciary Act of 1789 (First Statute, 73) States, ambassadors, and public ministers could be sued originally only in the Supreme Court of the United States, but these same States and people could sue as plaintiffs in any

court. What is illogical in the converse of this proposition? A variety of cases may be brought in more than one court at the option of the plaintiff. That is one of the privileges the plaintiff has as an offset to the burden of proof the plaintiff must carry. A like option need not, and in practice does not, inure to the benefit of the defendant. The defendant must answer in the court whose process is served upon him. The right of the defendant to change the forum was much liberalized during the troublous days of reconstruction, and the right of removal into the courts of the United States was very greatly extended. The policy underlying these provisions of the laws of the United States, as has been pointed out, was distinctly reversed, beginning with the National Bank Act of 1882, as to this particular class of corporations, and extending to all parties defendant under the terms of the Judiciary Act of 1887-8. It is respectfully submitted, therefore, that the decision of the lower court that it is unimportant whether the Federal corporation occupied the position of plaintiff or of defendant in the case is too broad a generalization and is not sound law.

The Only Possible Basis of Jurisdiction.

The only possible ground upon which jurisdiction based on the nature of the case can be sustained when the only support for it is the fact of the Federal incorporation of the defendant is this:

That because the existence of a party defendant capable of being sued and subject to process is derived from the law of the United States, the plaintiff in a suit against such a corporation must of necessity have a case that arises under the laws of the United States utterly regardless of the basis

of the plaintiff's cause of action. This is the final precipitate of the argument, and this proposition must be met face to face and answered on principle. As a matter of fact the appellants could obtain all the relief they need by an injunction against the officers of the Federal Reserve bank, who are joint defendants with the bank itself, and from this angle the proposition above stated might be avoided, but we do not think it necessary to avoid it. If the suit had been brought against the individual defendants alone, no jurisdiction in the Federal courts would have existed for the reason that jurisdiction is not conferred upon such courts in suits against officers and agents of the United States Government except they be appointed under or acting by authority of some revenue law of the United States, or they be officers of either house of Congress in the official discharge of their duties in executing an order of the house. Further elaboration of this point is unnecessary. The court is cited to *United States vs. Hill*, 123 U. S., 631, 685; *Peoples Bank vs. Goodwin*, 162 Fed., 937; *Benchley vs. Gilbert*, 8 Blatchford, 147; *McKee vs. Coffin*, 66 Tex., 304; *Illinois vs. Fletcher*, 22 Fed., 776; *Walter vs. Collins*, 167 U. S., 57; *Victor vs. Cisco*, 5 Blatchford, 128; *Davis vs. South Carolina*, 107 U. S., 597; *Tennessee vs. Davis*, 100 U. S., 257; *Cleveland vs. McLune*, 119 U. S., 454; *Venable vs. Richards*, 105 U. S., 636; *Campbell vs. James*, 3 Fed., 513, 516. No detailed investigation of these cases is required because the subject is clearly understood and recognized.

Returning then to the only possible reply to appellants' position—

Does the mere fact that a defendant in a case is a Federal

corporation vest original primary jurisdiction in the district courts of the United States over a case against such a defendant when the plaintiff's cause of action alleged against such defendant arises under laws other than the laws of the United States? Does the mere fact of the Federal incorporation of the defendant in such a case make it a case that arises under the laws of the United States in the sense of the constitution and the jurisdictional acts of Congress conferring jurisdiction based on the nature of the case, rather than upon the character of the parties? Unless these questions can be answered in the affirmative, we respectfully submit that the case at bar was wrongfully removed because the District Court of the United States for the Northern District of Georgia would not have had original jurisdiction of the case, there being no diversity of citizenship.

Cause of Action Distinguished from the Case.

To make a complete *case* in court there must be a plaintiff competent to sue and a defendant subject to process and duly served, but a *cause of action* may exist and survive though the party against whom it might be asserted cannot be found, or dies. So a cause of action may continue after the right to assert it is barred by the statute of limitations, and may be reinstated after it is barred. The *life* of any case, with respect to the cause of action, must spring from the law in force when and where the facts upon which it is based may transpire. The operation of the law upon the facts produces a cause of action, and a suit on the cause of action arises under the law that creates the cause of action. (*American Well Works vs. Layne*, 241 U. S., 257). If

society ever reaches the millennium, no law will be violated and no legal right will be invaded, no legal duty will be breached, and courts will be obsolete,—not because there may not be an abundance of persons and corporations competent to invoke their aid, and any number of others subject to their process, but because no rights of action between party and party can arise. The cause of action may exist, and generally does exist, regardless of the “race, color or previous condition of servitude” of the parties to it. Hence the origin of a defendant, whether natural or corporate, cannot, in and of itself, create a cause of action independently of the conduct of the defendant. All conduct (subject to judicial investigation) is either lawful or unlawful in its relation to society and its members. As regards corporations (artificial members of organized society) all conduct is either within or without the corporate powers delegated in the acts of their creation. Any conduct of a corporation that invades a legal right of another constitutes a legal wrong capable of redress. The wrong is not diminished, but rather accentuated, if such conduct is nominally within its corporate power, for it is unthinkable that under our system of Government corporations can be endowed with the right to commit a wrong. The quintessence of the law creating them forbids and (theoretically, at least) condemns their wrongful conduct, and it is utterly immaterial whether or not the legal right thus invaded springs from the laws of the sovereignty creating the offending corporation. Only in case such an invaded right is vested in the party wronged by the same act that created the offending corporation (for example, a stockholder therein) can the cause of action arising out of such wrongful conduct be traced to the charter of the

defendant. If the plaintiff's right rests on any other law, plaintiff's suit to enforce his cause of action draws its life from that law. Mr. Justice Holmes has said in the *Layne* case, *supra*, "A suit arises under the law that creates the cause of action." (241 U. S., 200.) If, on the other hand, the conduct complained of is *ultra vires*, it cannot be said that the relative rights of either party spring from the charter. In such case neither the cause of plaintiff's action nor the basis of defendant's defense can be traced to defendant's charter for support. In all cases, outside of suits between members of a corporation and the corporate entity, based on wrongful corporate action, the law embraced in the charter of a corporate defendant has no bearing on the "nature of the case" but serves only to supply a defendant upon whom process can be served. From the *Deveaux* case (5 Cranch, 61) down to date this court has consistently held that the charter power to sue and be sued, "if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would by law *have cognizance of the cause*." Merely invoking this corporate capacity as the basis of service upon a defendant of whom plaintiff seeks relief from a legal wrong cannot, without more, be the foundation of plaintiff's cause of action. If, however, a cause of action is asserted by a corporate plaintiff, its charter is the foundation stone of a suit to enforce its rights. As Mr. Chief Justice Marshall puts it in the *Osborn* case (9 Wheat., 738), "The charter of incorporation not only creates it (the plaintiff in that case) but gives it every faculty which it possesses. The power to acquire rights of

any description, to make contracts of any description, to sue on those contracts, is given and measured by the charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially, under the law?" The great Chief Justice was dealing with a case where the Federal corporation was the plaintiff, and, naturally, his language was adjusted to this.

Obviously, he did not deal with a case in which, instead of asserting legal rights, this artificial creature of Federal law was haled into court to answer for illegal and wrongful conduct, which no law Federal or State will sanction, but the consequences of which both sovereignties are equally bound to redress. Applied to a case brought against a Federal corporation, such as the case at bar, his further elaboration of the argument supporting the case he was considering would have to be paraphrased thus: "When a bank is sued, the first question which presents itself, *and which lies at the foundation of the cause*, is, is this legal entity subject to process? Can it be made to come, not into this court particularly, *but into any court?* This depends on a law of the United States." Can the first phrase underscored be reconciled to a cause of action asserted *against* a Federal corporation? Certainly the second phrase underscored would afford an option to the plaintiff to invoke the process of a State court in support of a cause of action against a Federal corporation if it violated a State law. Its corporate *obligation* to answer process and obey the mandate of the court before

which it is bound to appear by reason of its Federal incorporation, is a thing obviously different from its *right* to invoke the aid of the same court to redress wrongs against it. The obligation on the defendant inures to the benefit of the plaintiff as a means of redressing the wrongs complained of, but cannot be the foundation of plaintiff's rights. Plaintiff's rights are founded on its own charter, if it be corporate, and not upon the charter of the defendant. Plaintiff's rights (except in case of members of defendant corporation) are necessarily foreign to defendant's charter rights—and no controversy over these respective rights can exist except in antagonism and in conflict.

Further paraphrasing the argument of the court in the Osborn case so as to apply to a case where a Federal corporation is defendant:

"The next question is, has this being (Federal corporate defendant) a right to *breach* this particular contract? If this question be decided in the *affirmative*, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States." Such an argument cannot be attributed to the logical mind of the great Chief Justice. And yet it is demanded if the same considerations apply to a Federal corporation that is defendant as apply to it when a plaintiff.

If Congress could endow its corporate creature with power to *rightfully* breach a lawful contract, how can it be said that the other party to that contract has any right of action at all, based on its breach, much less a cause of action founded upon and drawing its life from a law of the United States?

The further elaboration of the reasoning of the court in the Osborn case demonstrates that it has no application

where the Federal corporation is the defendant. Necessarily it deals with the affirmative rights sought to be *asserted*, and illustrates their bearing on the "nature of the case" of the plaintiff as contradistinguished from the merits of the defense. Note this language in the same paragraph (p. 824):

"The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought."

It is respectfully submitted, therefore, that the Osborn case, so often cited and relied on to support the jurisdiction of the Federal courts over cases arising under the laws of the United States, is not authority supporting such jurisdiction, *based on the nature of the case*, where the Federal corporation is defendant, and its Federal charter is the only law of the United States upon which the plaintiff's case in any manner depends, and that dependence is confined to the fact that a corporate defendant has been created and made subject to the process of the courts.

The complaint that the Federal corporation has invaded plaintiff's rights, existing independently of the laws of the United States, through *ultra vires* acts, will require an interpretation of the Federal Reserve Act which contains the enumeration of the charter rights of the defendant Reserve Bank, and such an interpretation may involve a Federal question conferring appellate jurisdiction on the Supreme Court of the United States to review the final judgment of the State courts. But such a Federal question does not confer primary jurisdiction on the District Court of the United States merely because its determination may defeat the plain-

tiff's case. If this is the law since the Judiciary Act of 1887-8, the decisions in *Mottley vs. L. & N. R. R.* and parallel cases are obviously wrong. An interpretation of a law that destroys the cause of action of the plaintiff cannot make that law the source of the life of the cause of action. Such reasoning would liken the law to that species of poisonous insects that perish in the poisonous atmosphere that gives them birth. If, on the other hand, the interpretation is in favor of plaintiffs' contention, and the acts complained of are held to be *ultra vires*, the cause of action, if good at all, exists in spite of the Federal law, and the defense cannot invoke the Federal law in avoidance of its wrongful conduct. In such a result, the Federal law would be wholly eliminated as an element of plaintiffs' cause of action, with respect either to its life or its death, and would have no bearing whatsoever on the "nature of the case," upon which alone jurisdiction depends in the absence of diverse citizenship. If original jurisdiction does not exist, then removal was error, and the case should be remanded.

Federal Reserve Banks Are National Banks.

If, however, appellants are wrong in their contention that jurisdiction cannot rest upon the mere fact of Federal incorporation in the absence of allegations of the plaintiffs showing that their cause of action arises under the laws of the United States, then plaintiffs insist that jurisdiction of the United States court in this case is denied under the Judicial Code into which has passed the restriction of the jurisdiction of the United States courts over National banks originally enacted in the Second National Bank Act of 1882. The concrete statement of the law now embodied in the Judicial

Code must be read in the light of the language of the original statute upon which it is founded. That statute uses very broad terms, namely:

"The jurisdiction of suits hereafter brought by or against any association established under any law providing for National Banking Associations * * * shall be the same as, and not other than, the jurisdiction of suits by or against banks not organized under any law of the United States."

(Act of July 24, 1882, Sec. 4.)

As pointed out in the brief, and the authorities there cited, a National Banking Association is a moneyed corporation and is equivalent to the expression "National Banking Corporation" or "National Bank." The Federal Reserve Act makes the two designations synonymous.

Our argument is that the Federal Reserve banks are national banking associations within the spirit and letter of the acts of Congress regulating jurisdiction of the Federal courts over such institutions.

The learned trial judge disposed of this particular question as follows:

"National banking associations and the subsequently created Reserve banks are not *ejusdem generis*; their functions are different, and their chief characteristics are so unlike that it cannot be supposed that Congress intended them to be included in the former legislation. A cursory reading of the Federal Reserve Banking Act discloses that its great object is to give elasticity to the national currency and to prevent congestion in commercial centers. National banking associations are member banks of the reserve system. The National Reserve Board

is empowered to examine into the affairs of a national banking association; to supervise through the bureau under the charge of the Comptroller of Currency the issue and retirement of Federal Reserve notes; to grant national banking associations the right to act as trustee, executor or administrator; to permit member banks to carry in the Federal Reserve banks of their respective district any portion of their reserves required to be held in their own vaults, etc. The general object of the Federal Reserve system would be thwarted if the Reserve banks could only sue and be sued under the same conditions as national banking associations." (Transcript, pp. 102, 103.)

With great respect we submit this statement does not meet the real question involved. To illustrate the question an examination of the history and policy of congressional legislation on the subject is necessary.

The Court of Appeals disposed of the same question, in its opinion, on the ground that there were differences between the corporate powers and functions of Federal Reserve banks and ordinary national banks—(a) in the disparity of numbers, (b) Federal Reserve banks are banks of deposit and discount for other banks only and not for the general public, (c) Federal Reserve banks are governmental fiscal agencies with no general clientele, while ordinary national banks serve the general public and are numerous. The court then argues that to apply all the provisions of the National Bank Act to Federal Reserve banks is clearly impossible; yet the same reasoning that limits jurisdiction would make it necessary to apply all other limitations or grants to Federal Reserve banks. It is most respectfully submitted that this is a *non*

sequitur. The act withdrawing jurisdiction of the United States courts over National banks was passed in pursuance of the general policy of Congress to restrict the jurisdiction of United States courts, the same having been too much distended. The obvious purpose of Congress was to strike from the class of corporations entitled to *invoke* the jurisdiction of the United States courts the entire *genus* of National banks. The door was closed to any national banking association created by any act of Congress. It does not follow by any means, as contended by the Fifth Circuit Court of Appeals, that if Reserve banks are national banks for one purpose they are for all purposes of the National Banking Laws. There is no logical basis for such a conclusion. It is obvious, however, that if Congress had intended Federal Reserve banks to be exempted from the restriction imposed upon all other banks created by acts of Congress as to jurisdiction of the United States courts it would have said so. This would have been a very simple matter by providing in the charter of the Federal Reserve banks an express provision conferring jurisdiction upon the United States courts to entertain all cases by or against said banks, although the necessary effect of such a provision would have been to amend the general provisions of the general Judiciary Act of 1887-8 which as we have argued excludes jurisdiction of suits *against* Federal corporations. It is entirely conceivable that Congress might create national banks and authorize them to do business under certain restrictions that present national banks are not authorized to do; such, for instance, as loaning money on real estate. Indeed Congress has done this very thing by the creation of Federal Farm Loan banks. Such new creatures of Congress would be none the less national banks, and

fall none the less within the terms of the act of 1882, denying jurisdiction of the United States courts to such institutions merely because they were national banks. One very simple question can be answered and solve this whole problem. If Federal Reserve banks are not national banks, to what *genus* of corporations do they belong? But, the Court of Appeals proceeds to hold that it is safer to give Congress the intention of including in this restriction of jurisdiction only those national banks that were then being created, or those of a kindred nature that might thereafter be created. We contend for nothing more than the last proposition above stated, namely, that Federal Reserve banks are members of the same family of corporations as commercial national banks dealt with in the law limiting jurisdiction. It is very common to find in all legislation certain restrictions and burdens imposed upon corporations, as a class, having equal application to all members of that class although the detailed powers, capacities, and corporate activities of individual members of the class may vary as widely as human industry varies. Federal Reserve banks are not only of the same *genus*, they are of the same parentage and intimate members of the same family. Their relations are interlaced and, as will be shown, the entire Federal Reserve Act is but a redraft, reorganization, and harmonious co-ordination of the fiscal system of the United States composed of all its national banks, of all its Federal Reserve banks, and such of the State banking institutions as may avail themselves of its privileges. But, the opinion of the Court of Appeals proceeds further to argue that Congress may well have found reason not to withdraw jurisdiction by reason of Federal incorporation of Federal Reserve banks, notwithstanding it had done so in the case

of ordinary national banks. "There is no express withholding of jurisdiction. To imply it, would necessarily lead to other implications, so far-reaching and difficult to anticipate, that we do not think it should be implied." It is submitted that this is a complete reversal of the doctrine of conferring jurisdiction upon the courts of the United States. As we have shown, this jurisdiction is limited; it is derivative; it must rest upon express grant unequivocally set forth in some act of Congress. Such jurisdiction cannot be implied. If implication is necessary, jurisdiction fails. The implication which the reasoning of the court below requires would write into the Federal Reserve Act an express provision conferring jurisdiction over such banks in the United States courts. Such a provision will be looked for in vain. When this act was passed every member of Congress is conclusively presumed to have had vividly in mind, at the time he voted for this bill, the restrictive provisions of the law as to jurisdiction of the Federal courts over national banks. He must have reflected that he was creating a bank under the sovereign power of the nation, and therefore a national bank. If he had intended that it should not be governed by the existing law as to jurisdiction of the Federal courts over national banks, obviously, he should have made an express exception of the new member of the family of national banks then about to be born. Instead of doing this the corporate functions, down to the minutest feature and lineament of ordinary national banks, were conferred and indelibly impressed upon the Federal Reserve banks. Again, it is asked, if they are not national banks, will someone be good enough to inform us what there genealogy is? Having disposed of the points of dissimilarity which the Court of Appeals made controlling

it may throw some light on the subject to examine some of the points of similiarity existing between ordinary national banks and Federal Reserve banks.

They owe all their corporate existence to the acts of Congress. They all germinate through organization certificates filed with the same Federal official, known as the Comptroller of Currency. They all obtain their charters from the same official, each charter running for the period of twenty years. The basic charter powers of all of them are stated in the statutes authorizing their organization, and are shown in parallel columns as follows:

Charter of Ordinary National Bank.

1st. To adopt and use a corporate seal.

2nd. To have succession for the period of 20 years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

3rd. To make contracts.

4th. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

5th. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Charter of Federal Reserve Bank.

1st. To adopt and use a corporate seal.

2nd. To have succession for a period of 20 years from its organization unless it is sooner dissolved by an act of Congress or unless its franchise becomes forfeited by some violation of law.

3rd. To make contracts.

4th. To sue and be sued, complain and defend, in any court of law or equity.

5th. To appoint by its board of directors, such officers and employees as are not otherwise provided for in this act, to define their duties, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.

6th. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

7th. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the *business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this Title.

6th. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

7th. To exercise by its board of directors or duly authorized officers or agents, all powers specifically granted by the provisions of this act and such incidental powers as shall be necessary to carry on the *business of banking* within the limitations prescribed by this act.

(Enlarged, to correspond with like powers opposite, by sections 13, 14, and 16, *post*.)

An inspection of the Federal Reserve act and its amendments discloses the following additional points of contact and similarity between it, as a national bank, and the ordinary national bank as it existed prior to the passage of said act. For instance:

Section 3. Federal Reserve banks may establish branch banks.

Section 4. They may receive deposits.

Section 4. They may buy and sell exchange.

Section 7. They are required to keep reserves against deposits.

Section 4, Paragraph 8. They may issue ordinary national-bank notes secured by bonds.

Section 4. They cannot begin business until organized

by Comptroller of Currency, just as ordinary national banks.

Section 5. Their capital stock is fixed at \$100 a share like ordinary national banks.

Section 13. Authorized to receive deposits, collect checks, discount notes, drafts and bills of exchange, limited as to any one borrower in an amount not exceeding ten per cent of the unimpaired capital and surplus of the bank except as to drafts drawn against actual values, and lend money on collaterals.

Section 14. Deal in coin and bullion, making loans thereon, buy and sell at home or abroad, notes, bills, bonds, warrants issued in anticipation of taxes or revenues, purchase and sell bills of exchange and establish accounts for the purposes of exchange.

Section 15. May act as Government depository.

Section 16. May issue circulating notes.

These generic powers are all vested in and exercised by ordinary national banks.

A further inspection of the Federal Reserve act shows numerous amendments of the previously existing national bank law making it conform to the creation of Federal Reserve banks and injecting into the system of national banks the Federal Reserve banks.

In amending section 5154 of the Revised Statutes which is a part of the national bank act providing for the conversion of State banks into national banks, it is provided that such converted bank shall thereupon become subject to all the provisions of the Federal Reserve act and the original national bank act, thus merging the two acts into one enlarged legislative scheme for the creation and operation of the entire system of national banking under Federal regulation.

Section 5202 of the Revised Statutes, which is a part of the national bank law prior to the adoption of the Federal Reserve act, is amended so as to make a national bank an integral part of the system thus created and enlarged by the creation of the Federal Reserve banks, and welding into the Federal Reserve act the corporate powers of national banks under the law as it existed prior to that time. This is further illustrated by the amendment in the Federal Reserve act of section 5143, Revised Statutes, dealing with the subject of capital stock of national banks.

A further evidence of the design of the Federal Reserve act to harmonize, consolidate, and unify all pre-existing legislation on the subject of national banks is found in the provision of section 27 thereof, continuing in force the act of May 30, 1908, authorizing national currency associations and the issue of additional national bank circulation, and creating a national monetary commission.

This result is further illustrated by section 21 of the Federal Reserve act amending section 5240 of the Revised Statutes, which is a part of the national bank law prior to the adoption of the Federal Reserve act, subjecting national banks to examination by bank examiners approved by the Federal Reserve Board and conferring power upon the Federal Reserve banks to make special examination of their member banks; said section, as thus amended, providing for the examination of Reserve banks as well as member banks.

The foregoing analysis of the Federal Reserve act demonstrates beyond controversy that the Federal Reserve act is but an extension and enlargement of the pre-existing national bank acts and the amendments thereto, and results

in a merger into one system of all of the acts of Congress on the subject of national banks.

We have looked in vain in the Federal Reserve act for any language prescribing jurisdiction in either a Federal or State court, exclusive or concurrent, to pass upon or construe the provisions of said act. If Congress had intended to differentiate jurisdiction of the Federal courts touching these banks, it would have undoubtedly said so.

As Chief Justice Brewer says in the case of *Edochone Mining Co. vs. Rutter*, 177 U. S., pages 505-6, where he was dealing with the acts of Congress relative to mining lands, under sections 2325 and 2326 of the Revised Statutes:

"If it (Congress) had intended that jurisdiction should be vested only in the Federal courts (touching these laws or claims under them) it would undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts."

With the same genealogy, the same tenure of corporate existence, the same generic character of business, to wit: business of banking, the same general corporate powers touching their powers to sue and be sued, to make by-laws, to appoint officers and agents, to be managed by boards of directors, and to have capital stock, is it exaggeration to say that words have no power to define and language no faculty for description if they are not the same, not only in genus, but in family?

Being so, and being necessarily so considered by Congress when it created the Federal Reserve banks, if they were not to be subject to the same jurisdictional limitations Congress

must have said so. The well-defined policy of restricting the jurisdiction of the Federal courts over Federal banking and railroad corporations, as such, so often expressed, will not be departed from by implication.

Peoples Bank vs. Goodwin, 162 Fed., 937, 944.

We conclude, therefore, that if the Federal Reserve Bank of Atlanta was the only defendant in this case, the United States court would not have jurisdiction of the original bill. Hence it cannot be removed on this ground.

On the Merits.

The bill was dismissed on motion, on the ground that it sets forth no cause of action and is without equity. The substance of its allegations is "conspiracy and unfair competition." The amendment filed in the Federal court after removal (*Trans.*, p. 63), extends to the entire Federal Reserve system the scope of the conspiracy charged, and amplifies the details from which the conspiracy is inferred. That a complete reversal of existing practices is contemplated admits of no doubt, and is sought to be excused on the ground that it is mandatory under the Federal Reserve act. Because it is entirely legitimate to present a check at the window of the drawee bank in regular course of business and demand payment in currency, it is argued, and ruled, that any number of checks in the same bank may be accumulated and presented for payment in currency by special messenger, or any available channel other than the orderly transmission through the mails in accordance with the long-established practices in banking. That such procedure is more ex-

pensive and more difficult than the customary course is obvious, and the adoption thereof is conceded to be for the purpose of driving the country banks to waive their legal charges, denominated exchange, and remit at par. This presents to the country banks one of two alternatives, either of which will drive a large number of them out of business, and cause substantial loss of legitimate revenue to those which may be able to survive the losses involved. These facts are well pleaded, and stand admitted on the record.

The concrete question is:

Are these banks remediless in a court of equity?

The bank that renders the service involved in transmitting currency or remitting funds from one place to another is recognized in all banking laws, including the Federal Reserve Act, as legitimately entitled to compensation therefor.

Like service by the express companies is uniformly paid for, and charges therefor are now regulated by the public service commissions, and nobody is on the dead-beat list—not even the Federal Reserve banks.

Like service by the United States Postoffice is universally paid for at rates in excess of those customary with banks. The fact that the funds to be transmitted arise from checks drawn on the bank performing the service does not affect the right to charge for the transmission.

The check is paid in full and the proceeds of such payment become the subject-matter of the service performed in transmission.

An Illustration.

So much of the discussion of exchange charges as opposed to "par clearance" has been in technical terms, that some

men have been more confused than enlightened thereby.

Let us take a typical case of the use of a check from the beginning to the end of the transaction of which it is a part, as prepared by an experienced banker.

Smith & Company, of Bartow, Georgia, are merchants. They are well rated and their business is desirable. They handle shoes among other things. Calling on them in an effort to get their business, are the salesmen of wholesale shoe dealers in many cities. Savannah, Atlanta, Richmond, Lynchburg, Boston and St. Louis and perhaps many other cities compete for their trade. Competition is keen, but the Brown Shoe Company of St. Louis, for example, gets the business. They get an order for, say \$2,000.00 worth of shoes. The terms and the discounts are agreed upon but not one word is said about the bill being payable in St. Louis, or in New York or St. Louis or any other particular kind of exchange. Competition for the orders of Smith is too keen for that. Probably the cash discount for payment within the specified time is as much as five per cent, so one-tenth of one per cent exchange is relatively too small a matter to make a point of; the Shoe Company has doubtless included this item of exchange in its "overhead" in computing its costs on the shoes, and bills it back to Smith in the invoice.

Smith does business with the Bartow Bank and his check on that bank is good and has always been readily accepted by all from whom he buys goods. If St. Louis should refuse to accept Smith's local check—Atlanta, Savannah, Richmond or Lynchburg will, and so competition forced St. Louis to do so. The one-eighth or one-tenth of one per cent exchange is insignificant compared with the amount of the bill or the profit to be made by the Shoe Company on the order.

So the Shoe Company says nothing about how the bill is to be paid, well knowing that Smith in accordance with universal custom in such cases will send his local check when the time comes to pay.

Smith, being a merchant in a country town, buys cotton. He has sold a shipment of cotton and drawn on the purchasing factor in Savannah with bill of lading attached to his draft. He deposited that draft in the Bartow Bank to his account and got immediate credit. The Bartow Bank sent the draft to its Savannah correspondent for presentation and collection and credit to its Savannah account; but several days elapse before the shipment of cotton reaches the port and the factor pays the draft. When it is paid the funds become available to the Bartow Bank but are in Savannah. In the meantime the Bartow Bank has "absorbed the float" and allowed Smith immediate use of the funds in Bartow. That is, the bank has advanced out of its own funds the amount of the draft and made it available to Smith before his draft was paid, and done it without charge.

Could any bank in good conscience be asked to do more for its customer?

Now in the meantime Smith's bill for \$2,000.00 with the Brown Shoe Company has matured, and he has sent them his local check on Bartow to pay it, less the discount, as they knew he would when they sold him the shoes. That check is payable at the Bartow Bank and nowhere else. The Brown Shoe Company did not refuse the check and demand St. Louis exchange on the ground that the bill was due in St. Louis. They send him a receipt and thank him for his remittance and express the hope that they may be fortunate enough to get more of his business.

But the money to pay this check is in Bartow, and the

Brown Shoe Company is in St. Louis. The check is merely an order to pay at the bank in Bartow, and to be of any use to them its proceeds must be moved to St. Louis.

Up to this point the Bartow Bank has been no party to the shoe transaction—had no interest in it—knew nothing of it in fact. The Brown Shoe Company is not a customer of the Bartow Bank.

Still the fact remains that the check is in St. Louis and the money is in the bank at Bartow. To get this money the Brown Shoe Company must adopt one of two courses. It must go after the money or it must have it sent. The first is impractical, so the second is adopted. But this fact must be made clear and not lost sight of—the duty and burden of getting the money from Bartow to St. Louis is on the Shoe Company. So is the inseparable expense. The bank's duty is confined solely to paying the check at the bank when it is properly presented there.

How does the Brown Shoe Company go about obtaining this money?

It can send the check by mail to Bartow direct and ask that the proceeds be shipped to it by express in currency or that it be remitted in exchange. But that is the most expensive way. Even then, the bank is under no legal obligation to remit it. All it is obliged to do is to count out the money and lay it on the counter.

When you ask another to do a thing he is not obliged to do, it must be either as an accommodation or as a service for which you are willing to pay. It is optional with the party performing the service whether or not he will do it at all—and he may name the terms on which he will perform the service. You may reject the terms if you like, but you

cannot accept the service and refuse to pay a reasonable price.

As the most convenient and economical method of collecting the check—that is getting the money or its equivalent from Bartow to St. Louis—the Shoe Company deposits the check with its bank so the bank will collect the check for them through the usual banking channels. The St. Louis bank then becomes the holder of the check. But it holds it in the capacity of collecting agent for the Brown Shoe Company. The check is still subject to the equities between the parties, and Smith can stop payment on the check in the hands of the bank just as he could while it was held by the Shoe Company. When the Shoe Company's rights in the check passed to the bank, so did its duties and obligations pass.

Checks are not money and never can be, for a check is merely an order, subject to cancellation—an executory contract—is not even an assignment of the funds in the bank, and requires presentation and payment to become complete, while the mere delivery of money finishes the transaction.

So we see that the St. Louis bank which now holds Smith's check is under the same duty to go and get the money from the Bartow Bank which the Shoe Company was. Now the St. Louis bank was paid by the Shoe Company for the service and expense of collecting Smith's check in one or both of the following ways:

The St. Louis bank either charged the Shoe Company a straightout exchange charge, enough or more than enough to pay the exchange to the Bartow Bank, or it gave the Shoe Company what is known as "deferred credit"—that is, it withheld the credit from the Shoe Company's account for

four, five or seven days, until the check had been actually paid and the proceeds returned to St. Louis. Or, the Shoe Company is required to keep a collected balance with the St. Louis bank, the value of the use of which to the St. Louis bank is sufficient to compensate them for the service and expense. As a matter of fact, the bank probably makes both of these requirements. The St. Louis bank knows how long it is going to take to collect that check and how much it is going to cost, and make their requirements of the Shoe Company accordingly. There can be no question but that the St. Louis Bank collects for all the expense and service connected with the collection of the check. That is certain. Under the old plan it divided this with the remitting bank—under proposed “universal par clearance,” it keeps it all—of course it favors the plan which makes this possible.

Nor is this an expense to the Shoe Company, because they have included this cost as a part of their overhead and included it in the cost of goods and billed it out in the invoice to Smith, and a part of Smith's own check covers this cost.

The St. Louis bank holding the check proceeds to collect it. That may be through any one of several banking channels. It may send it direct to the Bartow Bank for payment and remittance or it may send it to the same destination through its correspondents and intermediate banks. So far as the Bartow Bank is concerned the result is the same. It receives the check through the mails with request for payment and remittance. Now this remittance by the Bartow Bank takes the form of the bank's check on its correspondent either in the city from which the check was last sent, or upon some reserve city, acceptable to the collecting bank. In any event the Bartow Bank must do these several things which are

outside and beyond its contract with Smith to pay the check at the bank:

It must make a record of the check and of where it was received from.

It must draw its own check or draft in settlement, on an expensive form.

It must record that draft on its books, either singly or as a part of a total, at least three and often five times.

It must write a letter and keep a copy of it, in which to enclose its own check, and describe the item.

It must furnish the form on which to write the letter.

It must furnish envelope and stamp and address the envelope.

It must furnish skilled clerical help to do this work, and finally it must have furnished the funds and maintained the account with a correspondent in a reserve city solely for the purpose of checking on it to pay such items.

Now who will say that all of this does not constitute a valuable and expensive service performed by the Bartow Bank? Who was it done for? For the holder of the check of course, and at his request, certainly. Neither the last holder of the check, nor any previous holder thereof is a depositor in the Bartow Bank. They are strangers to the Bartow Bank. Why then should the attempt be made to force the Bartow Bank to bear the expense of this operation and do this work for strangers without compensation?

This is the heart of the par clearance controversy. The Bartow Bank and others in like situation deny that any authority has the right to force them to perform a valuable and expensive service against their will for this Shoe Company or any other stranger who by chance comes into possession

of a check drawn on them. They maintain that the Shoe Company has no more right to demand this free service of them than their officers have to demand free shoes of the Shoe Company. Shoes are the Shoe Company's stock in trade—banking service is the bank's stock in trade, and there is no more equity in confiscating the one for private gain and benefit than the other. No class of institutions gives so much free service as banks, but surely they should be permitted to determine for themselves what services they shall donate and to whom. They are told that they should serve the foreign Shoe Company, which is not their customer, free, and recoup the loss by charging their customer, Smith, for what they do for the Shoe Company.

In other words penalize their customers, whose business supports the bank, for the benefit of the Shoe Company which is not and never will be a patron of the bank; and that the Country Banks so far have declined to do.

They decline to serve the cities at the expense of their own local communities—and there you have the heart of the par clearance controversy.

They do not believe Congress intended, in passing the Federal Reserve Act, to compel them to forego their rightful revenues and force them to render an expensive and valuable service to the customers of other banks free of charge.

Frequently no direct charge for such service is made because the interchange of business amounts to a substantial set-off. The banks thus mutually related, nevertheless, receive value for the service as real as if a charge was exacted on each transaction. In the absence of such direct charge, banks thus conditioned are described as "remitting at par," and the places in which all the banks there located are so

situated are designated "par points." When some of the banks in a place do not remit at par, the individual banks who do remit at par are scheduled on what is known as a "par list" of banks.

The conditions under which, by reason of substantially equalized interchange of business, compensation for the service of transmission of funds is effected through set-off rather than by direct charge, are dependent in large measure upon population of the respective cities, coupled with the amount of interchange of commerce or financial transactions between the respective communities involved. It results that this mutual interchange of business between large cities, especially when located in the same section of the country, is such that compensation by offset is almost universal. But the large number of small banks in the rural and relatively sparsely settled districts cannot get a fair return for such service by interchange of business, because the flow of transactions is always inward rather than outward in such localities. Hence it has always been the rule to make specific charge for transmitting funds from such isolated districts to the outside world. This makes it necessary for these "Country Banks" to maintain balances in financial centers against which to draw to cover remittances, and these drafts are commonly called "exchange," and the charge for the service of remittance has come to be called an exchange charge, though it will be readily seen that the consideration for the charge is the transfer of actual money from one place to another. In order to obtain these exchange deposits, and in part payment for the use of the funds thus deposited with them, the city banks collect checks on other banks, whether on par points or not, without charge. This reduces the costs to the

Country Banks of keeping funds at the financial centers as media of exchange, and correspondingly increases their profit on exchange charges. So that the compensation received by these Country Banks for the service of remitting funds has long been an important source of revenue to them, the loss of which would seriously embarrass many of them, and render it impossible for many others to make a living, and drive them out of business.

Since these rural communities draw on the outside world for many of the necessities and most of the luxuries of life, payment for which is commonly made through the medium of bank checks rather than in currency, a large percentage of such checks find their way into the hands of the dealers in such commodities. These dealers include the merchants and manufacturers throughout the country who make claims (somewhat extravagant) that they constitute "the commerce" of the country. They seem to have convinced the Federal Reserve Board and banks of the soundness of this claim. We pause to reflect, however, that their "commerce" would rapidly dwindle to the vanishing point did the overburdened "common people" out in the highways and hedges cease buying their wares.

Upon receipt of one of these checks on a Country Bank, a large percentage of which represents the dealer's profit on the transaction the check covers, the payee deposits it in usual course of business with his city bank (and the aggregate of these checks makes large deposit accounts much sought after by the big city banks, who in turn have to carry their reserves with the Federal Reserve banks), but unless drawn on a bank remitting at par, the dealer's bank deducts exchange charges, which are absorbed in the cost and expense accounts of the

dealer. Although the exchange charge is infinitesimal in comparison with the profit on a transaction of any magnitude, the wealthy merchants and manufacturers, whose deposits are much sought after, have convinced the Federal Reserve Board, apparently, that the exchange charge is a burden on "commerce," and some of their subalterns have gone so far as to call it "a vice that must be eradicated."

Since these charges are as legitimate as those made by the express companies or the post-office; or as freight, cartage and transportation of all kinds, it is difficult to see why one should be denominated a vicious burden on commerce more than another. Why should the Country Bank serve without pay any more than the express company, the post-office or the railroad, even though the service is demanded by and rendered to a Federal Reserve bank?

A Lawful Act May Become Unlawful.

If it be conceded that the coercive measures employed to compel Country Banks to remit at par are lawful, there is such a thing as committing a lawful act for an unlawful or vicious purpose. In such case the lawful thing will be prohibited by injunction if the manner and means of its performance are such as to injure any property or property right of others.

Numerous illustrations of this principle are to be found in the cases arising out of labor disputes and strikes. The principle illustrated and established by these cases seems to be analogous to that which is invoked in the present case. For instance, it is lawful to seek to persuade men to join a labor union, just as it is proper for the Federal Reserve

banks to try and persuade outside banks to take out membership or make clearance deposits with them and go on their par lists.

But when methods of persuasion are adopted that become embarrassing, annoying and expensive to the person to be persuaded, or involve any ingredient or element of intimidation or coercion, the courts will enjoin them.

In the carefully prepared opinion in *Walker vs. Cronin*, 107 Mass., 555, the court decided that a manufacturer is entitled to maintain an action against a third person, who with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employees to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. See also *Moran vs. Dunphy*, 177 Mass., 485. And the Supreme Court of North Carolina held in two cases (*Hawkins vs. Royster*, 70 N. C., 601; *Jones vs. Stanley*, 76 N. C., 355), that if a person maliciously entices laborers or croppers to break their contract with their employer and desert his services, the employer may recover damages against such person.

See also the other cases cited, *ante*, pp. 28 *et seq.*

Illegal Conspiracy.

An accepted definition of a conspiracy is "A combination of two or more persons by concerted action to accomplish some purpose, not in itself unlawful, by unlawful means."

Pettibone vs. United States, 148 U. S., 197, 203.

Duplex Printing Press Co. vs. Deering et al., January 3, 1921 (not reported).

It follows that although the purpose be lawful it may not be carried out by unlawful means.

The declared purpose of defendants is to establish so-called universal par clearance in the United States. If possible at all, it is not unlawful.

The means employed against appellants is the use of checks upon them by the Federal Reserve Bank, which, under the limitations of the Federal Reserve Act, the Reserve Bank is forbidden to collect where a charge for collection and remission can be lawfully exacted thereon, whether by a non-member bank, or by any other collecting agency whatsoever, or through any other medium of collection and remittance of proceeds.

The substance of the matters here complained of is an interference with appellant's legitimate banking business, intended to have coercive effect upon them through irregular methods of collection that result in violation of the statutory limitations and provisions contained in the charters and statutory regulations of the business of appellants on the one hand, and of the appellees on the other hand.

By no proper construction of the legal principles involved can the Federal Reserve bank be permitted to employ its normally lawful activities as a cloak for an unauthorized use of checks on appellants' banks in promoting a concerted plan to establish universal par clearance by coercing the unwilling co-operation and consequent property loss of appellants necessary to such establishment.

It is not deemed necessary to more specifically reply to the holding of the opinion of the circuit court of appeals that an illegal conspiracy is not predicable upon the doing of a lawful thing by lawful means even where done in concert

or combination. Nor, that no conspiracy is possible with other Federal Reserve banks because they operate only in their own district. We are unable to understand how a universal par clearance scheme can be made effective if it applies only in the several districts of the several banks. The amendment filed after the removal of this case very clearly discloses that all the Federal Reserve banks moved in unison under orders from the Federal Reserve Board in Washington, and that the effort to coerce and override the rights and privileges of the appellants in the Sixth Federal Reserve District is but an echo of similar conduct of the Federal Reserve banks in the other districts in the United States, and the excuse everywhere is that it is the ambition of the Federal Reserve Board to establish universal par clearance.

Duress.

The court of appeals seems to be of the opinion that unless the conduct complained of by the appellants amounted to duress they had no cause of action. The plaintiff never undertook to allege facts that would show duress. It did set up a clear case of unfair competition, and every effort to establish universal par clearance is unfair competition with the remote country banks that have not and cannot have that mutual exchange of business which justifies withdrawal of charge for the service of remitting the proceeds of checks. The adoption of means to bring about alleged universal par clearance by the methods charged against the Federal Reserve banks may not be inspired by malice, in the sense that they desire to use their tremendous financial power with such cruelty as to destroy the small State banks, but it can

be attributed, and under the allegations is attributed, to the ulterior purpose, not of mere collection of checks, but of collecting them in such an unusual and irregular manner as to compel the banks upon which they are drawn to lose the benefit of all State regulation as to amount of currency they are required to carry in vault as related to the amount of their deposits. Thus they would lose the revenues derived from lending out these funds and thereby be deprived of the opportunity of conducting a profitable business to such an extent that the lesser loss of yielding their legitimate charges for exchange will be accepted rather than choose the alternative of utter destruction. If the cases cited in the brief on the subject of the employment of methods which are inherently inoffensive in such a way as to produce illegal results mean anything, then the conduct charged against the Federal Reserve bank in this case constitutes such unconscionable and unfair business methods to the injury of these appellants as should appeal to a court of equity to prevent it on account of its inherent wrongfulness, utterly aside from all questions of *ultra vires*, duress, or illegal combination.

Sic Utres Tun, etc.

The cardinal error of defendants' position lies in the assumption that the right to collect checks through unaccustomed channels is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must be exercised with reasonable regard for the conflicting rights of others. It is a relative right—not an absolute right.

It is a fundamental principle that when the rights or privileges of one are liable to conflict with those of another each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other.

International News Service vs. Asso. Press, 248 U. S., 215, 235.

What is unfair competition in business must be determined with particular reference to the character and circumstances of the business.

Ibid., p. 236, and citations.

Equity will protect any civil right of a pecuniary nature as a property right.

In re Sawyer, 124 U. S., 200, 210.

In re Debs, 158 U. S., 564, 593.

And the right to acquire property by the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.

Truax vs. Raich, 239 U. S., 33, 37-38.

Breman vs. United Hatters, 73 N. J. L., 729, 742.

Barr vs. Essex Trades Council, 53 N. J. Eq., 101.

Collecting Checks by Mail.

The existence of the custom of banks to collect checks by mail is presumed to be within the knowledge of people of ordinary business experience.

Spear vs. U. S. (8 C. C. A.), 246 Fed., 250.

What is an Unlawful Combination.

Argument and persuasion are lawful, if directed to a lawful purpose; but, where there is a malevolent intent to produce an illegal result, and it is produced, a wrong is perpetrated, whether accomplished by mere persuasion or physical violence, and hence the members of a union intending to so injure complainants' business as to compel compliance with the union's demands may be enjoined from persuading workmen to quit complainants' employ or customers to abstain from dealing with complainants.

A. R. Barnes & Co. *vs.* Chicago Typographical Union,
No. 16, 83 N. E., 940; 232 Ill., 424.

Duplex Printing case, not reported.

Acts of third persons in "picketing" designed to molest and annoy persons employed or willing to be employed by a company are unlawful, and may be restrained.

Hitchman Coal case, 245 U. S., 229, and opinion of lower court in 172 Fed., 963.

Plaintiff is a non-union manufacturer of woodwork, employing men without reference to their membership in labor unions, and defendants, the officers of a woodworkers' union, requested plaintiff to "unionize" his plant by employing union men, and on its refusal to do so defendant circulated notices among the owners, contractors, and builders of the city to the effect that the members of the union would refuse to handle material not made under "strict union conditions," and such notices contained a list of the firms work-

ing under agreement with the union, which omitted plaintiff's name, and the union called strikes, enforced by fines against its members, against the builders and contractors who used plaintiff's materials. Held, that the acts of the union, through defendants, its officers, constituted an illegal attempt to injure the good-will of plaintiff's business, so as to constitute conspiracy, which would be enjoined; the fact that the *ordering of the strike was legal being immaterial*. Albro J. Newton Co. *vs.* Erickson, 126 N. Y. S., 949; 70 Misc. Rep., 291; ordered affirmed, 120 N. Y. S., 1111.

In Doremus *vs.* Hennessy, 176 Ill., 608; 43 L. R. A., 797, Judge Phillip says:

"The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses wilfully caused by another, from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent

to inflict an injury which causes loss. A conspiracy may, when accompanied by an overt act, create a liability, by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another, by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done, and which was done in pursuance of the conspiracy, would be alike liable, whether actively engaged in causing the loss or not. For acts illegally done in pursuance of such conspiracy, and consequent loss, a liability may exist against all of the conspirators. Appellants, and those persons who refuse to do appellee's work, had each a separate and independent right to unite with the organization known as the Chicago Laundrymen's Association, but they had no right separately or in the aggregate, with others, to insist that the appellee should do so, or to insist that appellee should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee or enter into contracts with her or do any further work for her was an actionable wrong."

The case (decided March 3, 1911) of *Folsom vs. Lewis* (Mass.), 94 N. E., 316, holds:

"This is one of ten bills in equity, brought by different parties and heard together before a master, to obtain an injunction to restrain the defendants from calling or declaring any strike, and from proceeding with any strike already called, to 'unionize' the plaintiff's shop, from inducing or persuading persons under contracts of employment to break them, and from conspiring or combining to prevent

any person, by threats, picketing or intimidation, from entering or continuing in the employ of plaintiffs, and to recover damages.

"The master was undoubtedly right in finding that the purpose of the defendants and the real object of the strike was not so much to obtain certain slight advantages referred to in the proposed agreement, as to compel the employers, by inflicting this injury upon them, to *submit to an attempt to obtain* for the union a complete monopoly of the labor market in this kind of business, by forcing all laborers who wished to work to join the union, and by forcing all employers to agree not to employ laborers, except upon such terms as they could make with the combination that should control all labor in this business. This has been held to go beyond the limit of justifiable competition. Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union, to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to strike."

Berry vs. Donovan, 188 Mass., 353; 74 N. E., 603; 5 L. R. A. (N. S.), 899; 108 Am. St. Rep., 499.

Plant vs. Woods, 176 Mass., 492; 57 N. E., 1011; 51 L. R. A., 339; 79 Am. St. Rep., 30.

Pickett vs. Walsh, 192 Mass., 572; 78 N. E., 753; 6 L. R. A. (N. S.), 1067; 116 Am. St. Rep., 272.

Many of the facts disclosed in a case decided by the Supreme Court of Minnesota on June 15, 1906, are so similar to the facts here that some of the principles of the decision are quite pertinent. The case referred to is:

Peabody *vs.* Citizens' State Bank of St. Charles *et al.*, 108 N. W., 272: 98 Minn 302

On November 22, 1904, and until November 30, 1904, Robert A. Johnson and S. J. Lombard were, and for some time prior thereto had been, carrying on a private bank at the village of Utica, in Winona County, under the firm-name of the First Bank of Utica, where deposits were received, checks paid, and a general banking business done. On November 22, and November 29, 1904, the respondent had on deposit and to his credit at said First Bank of Utica, subject to his check, a sum of money exceeding \$100. On November 22, 1904, the respondent drew and delivered to the Brown Mercantile Company a check upon the First Bank of Utica for the sum of \$100. This check was in the ordinary form, and was on November 29th, by the Brown Mercantile Company, indorsed and delivered to the Citizens' Bank of St. Charles, one of the appellants here. On the same day, shortly before 4 o'clock in the afternoon, the appellant Knapp, acting as an officer and agent of the defendant Citizens' State Bank, and with due authority and direction therefrom, appeared at the First Bank of Utica, having in his possession said check drawn by plaintiff and six or seven other checks upon said First Bank of Utica drawn by other persons, the aggregate amount of all the checks, including the plaintiff's said check, being nearly \$1,800, and demanded from said First Bank of Utica cash payment of all said checks and the aggregate amount called for by the same.

There was no separate or distinct presentation or demand for payment of plaintiff's said check. One Loudon was then in charge of said First Bank of Utica, acting as cashier thereof, under authority from said Johnson and Lombard. He had not sufficient cash then actually on hand in said bank to pay all of the checks, but had more than enough to pay plaintiff's check, if specific and independent demand had been made for the payment thereof. The First Bank of Utica had, however, in the First National Bank of St. Charles, Minn., a much larger sum of money than would have been necessary to pay all of the checks, and offered Knapp, for said Citizens' State Bank, a check on said First Citizens' State Bank, for the full amount thereof, but the offer was refused. In the meantime the First National Bank, at the request of Lombard, sent a special messenger bearing \$2,000 in currency to said First Bank of Utica—a distance of six miles—for the purpose of paying the checks, and of this fact Knapp was informed by Loudon; but *Knapp declined* to wait for the currency and left the village of Utica before 5 o'clock p. m. to return to St. Charles.

The currency was subsequently tendered in full of all the checks presented, but was declined and the checks protested for non-payment. The court held the protest to be wrongful; that the well-understood customs of the business entered into and became a part of the contract to pay the checks; that the obligation of the bank is to a certain extent conditional—for instance as to customary times and places, date of check, genuineness of endorsement, etc.; that this is the understanding necessarily imposed on the depositor when deposits are made. The evidence disclosed that the holder of the checks came in person to present them in an effort to make some arrange-

ment with the drawee bank to remit at par, precisely as is now being done by the Federal Reserve banks all over the country. The subject was broached in these words of colloquy between the holder of the checks and the cashier of the drawee bank.

" 'I have a bunch of checks here * * * unless we can make some definite arrangements to par checks with you, I will have to have my money on this bunch.' And I said: 'If you want your money, I will give you a draft on the Bankers' National Bank of Chicago.' And he says: 'No, that won't go. The point is: Will you or will you not par checks?' And I says: 'What is the amount of those checks?' He says: 'The amount is immaterial. That is not the point. The point is this: Will you or will you not par checks?' And I says: 'I will call Mr. Lombard,' " etc. The witness testified that he called Mr. Lombard by telephone and explained the situation to him, and he said: "'You tell Mr. Knapp we will par the checks he has.' And I told Mr. Knapp, and Mr. Knapp says: 'No, that won't do at all. You got to agree to par all checks, and you got to agree to it here and now, or I will protest every one of these.' " Knapp further said, in reply to the request that he call at the First National Bank of St. Charles on his way home for the money, but it wasn't a question of money; it was a question of parring checks.

The court held that the refusal to accept the currency subsequently tendered in payment of the checks was entirely indefensible, and the rights of the depositor were ruthlessly disregarded. The concrete ruling was that the protest was wrongful and the insistence upon technical rights of payment in currency on demand was hardly consistent with good faith and fair dealing.

So here, the reversal of all usages and customs in

presenting checks for payment in currency under precisely the circumstances disclosed in the Minnesota case and for precisely the same ulterior purpose is an insistence on a technical right inconsistent with good faith and fair dealing. Since the result is admittedly disastrous to the country banks, such conduct should be enjoined.

It is perfectly obvious that in case at bar the purpose of the individual defendants in threatening embarrassing, annoying, and expensive methods of collection is not in good faith to promote the interests of the bank, but is intended to coerce the plaintiffs to go on the par list against their will. This vicious purpose makes what might be lawful under some decisions, unlawful in the case at bar.

In *W. & A. Fletcher Co. vs. International Association of Machinists* (N. J. Eq.), 55 Atl., 1077, the court said:

"Picketing may be lawful; picketing may be unlawful. Whether picketing is lawful or unlawful depends wholly upon the purpose with which it is carried on, or perhaps it would be more accurate to say the effect which is produced by it. If the purpose and effect are to intimidate, to interfere with the liberty of workmen in seeking employment, interfere with what in another case I called the employer's right to have labor flow freely to him, so that a reasonably courageous person would be restrained from offering his labor to such employer, then picketing is unlawful, and, where the other necessary conditions for the interference of a court of equity exist, will be prohibited by an injunction."

Such a vicious purpose supports the charge of combination to injure plaintiff's business and this once established makes an otherwise lawful act itself unlawful. Instead of persuasion the individual defendants openly threaten what may be appropriately termed "*financial violence*."

Motive.

The motive of defendants is sometimes controlling as to the legality of their conduct.

See *Coons vs. Chrystie*, 53 N. Y., 668.

Here it was held to be an unlawful undertaking for the walking delegate and others officers of a labor organization to cause the workmen in the plaintiff's employ to abandon their employment, not for the purpose of securing better wages elsewhere or of protecting the scale of wages, but solely to deprive the plaintiff of the service of the striking workmen as a punishment for his failure to become a member of the master plumbers' association, recognized by such labor organization; though there were no threats or acts of intimidation used to cause the men to stop work, and though the workmen had agreed with the union not to accept employment from employers unaffiliated with the union.

In *Thomas vs. C., N. O. & T. P. R. Co.*, 62 Fed., 803, Judge Taft said:

"The combination was unlawful. • • • The employees of the railway companies had no grievances against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use

of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service and actually quitting their service. This inflicted an injury * * * unlawful because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person when the relation thus sought to be broken had no effect whatever on the character or reward of their service. * * * The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do."

It is the motive for quitting and the end sought thereby that make the injury inflicted unlawful and the combination by which it is effected an unlawful conspiracy.

22 Cyc., 846, 858.

Sperry vs. Mechanics, 128 Fed., 800.

Miles Med. Co. vs. Goldthwaite, 133 Fed., 794.

We follow the line of authorities quoted and follow certain English and American cases, viz:

Allen vs. Flood, 77 L. T. N. S., 717 (46 Week Rep., 256).

Bayard vs. Folsom, 68 Vt., 219 (54 Am. St. Rep., 100).

Boyd vs. City of New York, 21 Pa., 308.

The basic principle there announced is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial. However, as Mr. Justice Holmes has well said (*Plant vs. Woods*, 176 Mass., 492), this abstract truism cannot be rightly applied to all cases. In the evolution of the law growing out of the ever-increasing complexities of civilization and commerce it has been found that where a lawful right to do a thing coexists with a proper motive in doing it, the right itself is so conditioned on the motive that it cannot be exercised under any conceivable motive. It is too broad a generalization to say that an act lawful under one set of circumstances is lawful under every conceivable set of circumstances. A few illustrations from decided cases demonstrate the proposition. Excavation on your own property with due care is strictly lawful, in and of itself, but otherwise if done, not to benefit yourself, but for the sole purpose of injuring the adjoining owner (*Panton vs. Holland*, 17 Johns, 92; 8 Am. Dec., 369). The superior right of navigation cannot be rightfully exercised over the inferior right of fishery, when the alteration of course is made to destroy fish nets rather than to safely reach port (*Post vs. Munn*, 4 N. J. L., 61; 7 Am. Dec., 570). The right to use water as it flows cannot be exercised to divert its course for the purpose of lessening plaintiff's supply and thus compel plaintiff to buy out defendant to protect his own property (*Springfield Waterworks Co. vs. Jenkins*, 62 Mo. App., 74). The right to compete for business cannot be exercised regardless of loss incurred and for the sole purpose of driving competitors out of business, or to compel a specific competitor to rent and occupy a particular place of business (*Tuttle vs. Buck*, 107 Minn., 145; 131 Am. St. Rep., 446).

In the language of a commentator on the cases cited:

"The laws of competition in business are harsh enough at best; but if the rule here suggested were to be carried to its logical and seemingly unavoidable extreme, there is no practical limit to the wrongs which may be justified upon the theory that 'it is business.' Fortunately, we think, there has for many years been a distinct and growing tendency of the courts to look beneath the letter of the law, and give some effect to its beneficent spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppression and wrong. It is doubtless true that under many circumstances an act is legally right and defensible without regard to the motive which induces or characterizes it; but there is abundance of authority for saying that this is by no means the universal rule, and that an act which is legally right when done without malice may become legally wrong when done maliciously, wantonly or without reasonable cause."

It seems obvious that this tendency has progressed to the point where the doctrine of *Allen vs. Flood*, and kindred cases, *supra*, is open to many exceptions springing from the facts and circumstances of the particular case. The case at bar is believed to be within the exception and without the rule. The facts are admitted. The embarrassing, annoying and expensive methods of collecting checks by presentation at the counters of the drawee banks are resorted to, not for the sake of profit to the Federal Reserve Bank—quite the contrary. Any cost is to be incurred in making collections in this manner rather than in regular course at the customary and nominal charge. The inconsistent and anomalous

excuse is given that the law forbids payment of the nominal charge in regular course, but that the irregular course may be employed regardless of cost. (Trans., 35.)

That the purpose of adopting these unusual and irregular methods (confessedly embarrassing, annoying, and expensive to the Country Banks to a degree that will drive hundreds of them out of business altogether) is to compel assent of the drawee banks to remit at par if the customary channels of collection are continued in force.

That if such agreement is assented to the irregular methods will be immediately abandoned and the customary means of collection reinstated is not only not denied but expressly held out as the inducement to make the agreement to remit at par.

That remittance at par by Country Banks not only deprives them of legitimate revenues they have always enjoyed under their State charters, but imposes additional expense on their business, is alleged and admitted. Some mitigation of the expense is proposed by the Federal Reserve Bank in its offer to pay express, postage, and insurance charges covering funds in transit (Trans., 35 (1) (2)). However, no provision is made to cover cost of overhead and loss of the use of funds in transit. Obviously, the legality of the employment of these embarrassing, annoying, and expensive methods cannot be judged apart from the motive which expressly actuates such employment. Such conduct, we submit, is the application of force without legal justification, and in its moral quality may be no better than highway robbery, or financial violence.

Ultra Vires.

Thus far the case has been considered irrespective of the charter power of defendant Reserve Bank to do the things sought to be enjoined. We have endeavored to show that a natural person could not legally resort to such methods of invasion of the rights of the Country Banks. If, in addition to the inherent vice of such conduct, the Federal Reserve Bank seeks to go beyond its corporate power in doing the things complained of, plaintiffs are entitled to plead *ultra vires*, and, if successful, injunction is a legal necessity.

The opinion of the court of appeals disposes of the charge of *ultra vires* by applying the well-known doctrine that stockholders or the State creating the corporation are primarily the only parties entitled to invoke relief from *ultra vires* acts. We have cited cases in the brief pertaining to this proposition holding that while it is generally the province of the State to proceed in those cases where *ultra vires* acts of a corporation result in public injury, yet it is well settled that an injunction will lie at the suit of private parties to restrain acts in excess or abuse of corporate powers which result in private injuries.

The right to conduct one's business without wrongful and injurious interference is a valuable right. This well-established rule recently was reannounced by the Supreme Court of Alabama in the following language:

"The English and American courts have, we believe, without exception, held that the right to con-

duct one's business, without the wrongful and injurious interference of others, is a valuable property right which will be protected, if necessary, by the injunctive processes of equity. *Gray vs. Build, Trades Council*, 91 Minn., 171; 97 N. W., 663; 63 L. R. A., 753; 103 Am. St. Rep., 477, 485; 1 Ann. Cas., 172; *Vegelahn vs. Guntner*, 167 Mass., 92; 44 N. E., 1077; 35 L. R. A., 722; 57 Am. St. Rep., 443; *Beck vs. R. T. P. Union*, 118 Mich., 497; 77 N. W., 13; 42 L. R. A., 407; 74 Am. St. Rep., 421, 429."

Hardie-Tynes Mfg. Co. vs. Cruse, 66 Sou., 660.

To the same effect are the many "strike" cases, above cited, with which this court is entirely familiar.

It necessarily follows from the principles above stated and the authorities above cited that if one's business be injuriously affected by the *ultra vires* acts of a corporation, such acts may be enjoined at the suit of the party so injured.

The bill in this case shows with the utmost fullness and clearness the injury which will result to the business of the plaintiffs from the acts which the defendants contemplate and threaten, and it follows that if the declared purposes and threatened acts of the defendant bank are *ultra vires*, the plaintiffs are entitled to relief.

The bill shows that at all times the small banks in the interior, known as Country Banks, have made a small charge for the handling of checks upon them sent through the mails, including the transmission of funds in settlement thereof, and that until very recently the Federal Reserve Bank has refused to accept or handle any checks upon non-member banks, it deeming itself unauthorized to pay the charges above mentioned.

It was well fortified in this position by the opinion of Attorney General Gregory of March 21, 1918, supplemented by an explanatory opinion on the same subject of April 30, 1918. For the convenience of the court this opinion is set forth in full, as follows:

Collection and Payment of Checks.

The following opinion, relating to charges for the collection and payment of checks cleared through a Federal Reserve bank, has been rendered by the Attorney General of the United States:

March 21, 1918.

SIR:

You have requested my opinion as to whether the limitations contained in section 13 of the Federal Reserve act relating to charges for the collection and payment of checks can be held to apply to State banks which are neither members of the Federal Reserve System nor depositors in Federal Reserve banks.

As originally enacted, the first paragraph of section 13 reads as follows:

"Any Federal Reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national bank notes, Federal Reserve notes, or checks and drafts upon solvent member banks, payable upon presentation, or, solely for exchange purposes, may receive from other Federal Reserve banks deposits of current funds in lawful money, national bank notes, or checks and drafts upon solvent member or other Federal Reserve banks, payable upon presentation."

In section 16, apparently as the basis of a system

of check clearing or collection, it is provided that Federal Reserve banks *shall receive on deposit at par* checks and drafts on member and other Federal Reserve banks; and the Federal Reserve Board is authorized to fix by rule the *charges to be collected by member banks from patrons whose checks are cleared through the Federal Reserve bank* and any charge for the service of clearing or collection rendered by the Federal Reserve bank.

It will be noted that under the first paragraph of section 13 in its original form the only classes of banks which might be depositors in and thus clear through a Federal Reserve bank were its member banks and other Federal Reserve banks, and the only checks and drafts specified as receivable on deposit were checks and drafts drawn upon member banks or upon other Federal Reserve banks.

The acts of September 7, 1916, and June 21, 1917, so amended the first paragraph of section 13 as to extend the clearing and collection facilities of the Federal Reserve system to include checks and drafts generally, to make these facilities directly available to non-member banks and to establish the limitations as to charges referred to in the question submitted. The paragraph as so amended reads as follows:

"Any Federal Reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national bank notes, Federal Reserve notes, or checks and drafts, payable upon presentation, and also, for collection, maturing notes and bills; or, solely for purposes of exchange or of collection, may receive from other Federal Reserve banks deposits of current funds in lawful money, national bank notes, or checks upon other Federal Reserve banks, and checks and drafts, payable upon presentation within its district, and

maturing notes and bills payable within its district; or, solely for the purposes of exchange or of collection, may receive from any non-member bank or trust company deposits of current funds in lawful money, national bank notes, Federal Reserve notes, checks and drafts payable upon presentation, or maturing notes and bills; *Provided*, Such non-member bank or trust company maintains with the Federal Reserve bank of its district a balance sufficient to offset the items in transit held for its account by the Federal Reserve bank: *Provided further*, That *nothing in this or any other section of this act shall be construed as prohibiting a member or non-member bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100, or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but no such charges shall be made against the Federal Reserve banks.*" [Italics ours.]

The limitations as to charges referred to in the question submitted are contained in the second proviso quoted above. This proviso, apparently recognizing an existing right of member and non-member banks to make reasonable charges for the collection or payment of checks and drafts and remission therefor by exchange or otherwise, provides (1) that these charges are "to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100," but (2) that "no such charges shall be made against the Federal Reserve banks."

Clearly these limitations apply to national banks which are compelled to be member banks, to such State banks as become member banks by voluntarily accepting the terms and provisions of the Federal

Reserve Act, and to such other State banks as do not become member banks but by becoming depositors in Federal Reserve banks upon the conditions specified avail themselves directly of the facilities of the Federal Reserve clearing system.

The specific question to be determined is whether these limitations apply to non-member State banks which do not become depositors but checks upon which may pass through Federal Reserve banks in process of clearing or collection.

The theory and scheme of the Federal Reserve legislation seems inconsistent with the purpose on the part of Congress to subject State banks *against their will* to Federal control or regulation. State banks are not compelled to become members of the Federal Reserve system or depositors therein. Those possessing the necessary qualifications are, however, invited to become members. They are not only free to accept or decline, but if they accept remain at liberty to withdraw from the system. (Sec. 9.) By section 13 as amended, State banks not desiring to become members or too small to be eligible for membership are likewise *invited* to share in the clearing and collection facilities of the system by becoming depositors in Federal Reserve banks. But they may accept or reject the invitation, and if they become depositors may close their accounts at their pleasure.

It would accordingly seem that the limitations referred to ought not to be regarded as intended to be imposed upon State banks not connected with the Federal Reserve system as members or depositors, against the will of such banks, unless that intention clearly appears.

The term "non-member bank" as used in the proviso may reasonably be construed as referring to a non-member bank that has become a depositor as authorized in the preceding provisions of the para-

graph. If this term is so construed, obviously the provision requiring charges "to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100," will have no application to non-member State banks which are not depositors in a Federal Reserve bank. The broad language of the concluding clause, "no such charges shall be made against the Federal Reserve banks," may be construed not as directed against State banks which are not depositors but merely as specifying a condition upon which checks may clear through the Federal Reserve banks—in effect a prohibition against the payment of such charges by the Federal Reserve banks.

Under this construction, member banks and non-member banks which are depositors in the Federal Reserve banks will be subject to the limitations in the proviso, but non-member banks which are not depositors will not be subject to the limitations. All, however, will have to adjust their charges among themselves and with their own depositors, the Federal Reserve banks being prohibited from paying such charges.

This construction seems to be in harmony with the intention of the framers of the amendment to section 13 embodying the above-mentioned proviso.

The act of June 21, 1917, amending section 13 and other sections of the Federal Reserve Act, as originally introduced in both the House and Senate contained no part of the (second) proviso, the section in the proposed amended form ending with the preceding proviso. The Senate, adopting an amendment offered by Senator Hardwick, added the second proviso in the following form:

"Provided further, That nothing in this or any other section of this act shall be construed as pro-

hibiting a member or non-member bank from making reasonable charges, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time for collection or payment of checks and drafts and remission therefor by exchange or otherwise." (55 Cong. Rec., 1988.)

It was thought the effect of the Hardwick amendment would be to recognize the right of any bank upon which checks are drawn to make charges against the Federal Reserve bank through which such checks might be cleared or collected. The Hardwick amendment was opposed by the Federal Reserve Board, as appears from letters from its governor to Senator Owen and Congressman Glass, chairmen of the respective committees on Banking and Currency of the Senate and House (pp. 1984, 3527). The President also called attention to the seeming effect of the amendment in a letter to Senator Owen, reading as follows:

"I have been a good deal disturbed to learn of the proposed amendment to the Federal Reserve act which seems to contemplate *charging the Federal Reserve banks for payment of checks cleared by them* or charging the payee of such checks passing through the Reserve banks with a commission. I should regard such a provision as most unfortunate and as almost destructive of the function of the Federal Reserve banks as a clearing house for member banks, a function which they have performed with so much benefit to the business of the country.

"I hope most sincerely that this matter may be adjusted without interfering with this indispensable clearing function of the banks" (p. 3761).

In conference, apparently as the result of the letters of the governor of the Federal Reserve Board

and the President, the proviso took its present form, two changes being made by the conferees: First, the charges which member or non-member banks may make were made subject "to be determined and regulated by the Federal Reserve Board"; and second, the final clause was added, "but no such charges shall be made against the Federal Reserve banks."

In presenting the conference report to the Senate, Senator Owen emphasized the importance of not interfering with the clearing functions of the Federal Reserve banks, explained that under the proviso as amended "the banks can charge each other for making these accommodations if they like, and they can adjust that to their own satisfaction with one another, without troubling the Reserve banks," and apparently conceded that State banks not connected as members or depositors with the Federal Reserve system could not be subjected to Federal legislation (p. 3761).

Mr. Glass, in presenting the report to the House, said:

"The Congress has no control whatsoever over non-member banks. It cannot regulate their charges and will not regulate them if this Hardwick amendment should prevail. * * * This House has no control over the non-member bank in this matter. Even the Federal Reserve Board has no control over their operations unless they voluntarily join the voluntary collection system established by the Federal Reserve Board" (p. 3526).

And, further—

"No non-member bank that does not voluntarily join the collection system established by the Federal Reserve Board will be specifically affected. No law that we pass here can directly affect them. The

only way they can be affected is incidental" (p. 3528).

It thus seems clear that the proviso was understood by Congress as designed to protect the clearing functions of the Federal Reserve banks and not directed at State banks which have no connection as members or depositors with the Federal Reserve System and upon which it was considered the effect of the proviso could be only incidental.

It may be argued and is probably true that the proviso will necessarily affect the practice of State banks, though not members or depositors, as to making charges for the payment of checks drawn upon them. With the concentration of reserve balances in Federal Reserve banks, as required by the Federal Reserve act, the Federal Reserve clearing system may offer the only adequate and convenient facilities for clearing or collecting checks drawn upon banks at a distance, and depositors may find it inadvisable to maintain accounts with banks upon which checks cannot be cleared or collected by the use of these facilities.

The Federal Reserve act, however, does not command or compel these State banks to forego any right they may have under the State laws to make charges in connection with the payment of checks drawn upon them. The act merely offers the clearing and collection facilities of the Federal Reserve banks upon specified conditions. If the State banks refuse to comply with the conditions by insisting upon making charges against the Federal Reserve banks, the result will simply be, so far as the Federal Reserve act is concerned, that since the Federal Reserve banks cannot pay these charges they cannot clear or collect checks on banks demanding such payment from them.

From what has been said it follows that in my opinion the limitations contained in section 13 relating to charges for the collection and payment of checks do not apply to State banks not connected with the Federal Reserve system as members or depositors. Checks on banks making such charges cannot, however, be cleared or collected through Federal Reserve banks.

Respectfully,

T. W. GREGORY,
Attorney General.

The PRESIDENT,
The White House.

Under date of April 30 the following letter supplementary to the foregoing opinion was written:

MY DEAR GOVERNOR:

I acknowledge receipt of your letter of the 19th instant with reference to my opinion of March 21, 1918, holding that Federal Reserve banks are prohibited from paying the charges for collection and payment of checks and drafts mentioned in the first paragraph of section 13 of the Federal Reserve act.

In a memorandum by the general counsel of the American Bankers' Association, which you inclose, the point is raised that the prohibition against the charges referred to must be confined to checks owned by the Federal Reserve bank as distinguished from checks deposited to be cleared or collected for the account of a member or depositor.

You ask to be advised whether the board correctly interprets my opinion as implying that no such distinction can be recognized and that no member bank can under any circumstances make any charge against its Federal Reserve bank in connection with

the collection or payment of checks deposited with the Federal Reserve bank as provided in the paragraph mentioned.

The reason for the suggested distinction is not apparent. I do not understand why checks deposited with a Federal Reserve bank to be cleared or collected cannot be considered as owned by the bank.

As the basis of the check clearing system contemplated by the Federal Reserve act, the Federal Reserve banks are required by section 16 to "*receive on deposit at par, unconditionally, the checks therein specified drawn on Federal Reserve and member banks.* If the phrase "receive on deposit" is given its ordinary signification, it seems clear that the Federal Reserve bank becomes the owner of the checks so deposited, title to the checks passing to that bank and the depositors receiving immediate credit therefor. (Burton *vs.* United States, 196 U. S., 283; Security National Bank *vs.* Old National Bank, 241 Fed., 1, and cases therein cited at pages 10 to 12.)

The first paragraph of section 13, as amended to extend the clearing facilities of the Federal Reserve banks to non-member banks and to include checks generally, requires each non-member bank availing itself of these facilities to maintain with the "Federal Reserve bank of its district a balance sufficient to offset the items in transit held by the Federal Reserve bank." As so amended the paragraph may be regarded as at least authorizing the Federal Reserve bank to receive on deposit from non-member depositors as well as from member banks all classes of checks to be cleared or collected, taking the title thereto and giving credit therefor to the depositing banks.

As a Federal Reserve bank may thus become the

owner of all the checks cleared or collected through it, there appears to be no basis in the act for drawing a distinction between checks owned by the Federal Reserve bank and checks deposited with it to be cleared or collected.

But even if the checks received could be classified on the basis suggested, the language of the paragraph seems to preclude the idea of excluding checks deposited to be cleared or collected from the checks as to which charges are prohibited.

The charges which the Federal Reserve banks are prohibited from paying by the final clause, "*no such charges shall be made against the Federal Reserve banks,*" obviously include the "charges . . . for collection or payment of checks and drafts and remission therefor by exchange or otherwise" mentioned in the preceding clause. The checks authorized by the paragraph to be deposited with the Federal Reserve bank, upon being received by that bank, are to be collected from and paid by the banks upon which they are drawn. To say that charges in connection with the payment of these checks made by the banks drawn upon and collected from the Federal Reserve bank are not made against that bank seems to do violence to the ordinary meaning of the words used, regardless of whether the charges are ultimately borne by it or subsequently transferred to the banks by which the checks were deposited.

Moreover, the legislative history of the amendment as referred to in the opinion shows clearly that the prohibition was directed primarily against the making of charges in connection with the clearing of checks. It was a proposed amendment to the Federal Reserve act which apparently contemplated "charging the Federal Reserve banks for payment of checks cleared by them" that the President opposed

in his letter to Senator Owen. And it was to prevent the possibility of such charges being made that the final clause was added, which, as explained by Senator Owen, prevented "troubling the Reserve banks" or "interfering with the clearing of checks at par by the Reserve banks." (55 Cong. Rec., p. 3761.)

I construe the first paragraph of section 13 as prohibiting member banks under any circumstances from making the charges therein referred to against Federal Reserve banks.

You are accordingly advised that the interpretation placed by the board upon my opinion of March 21 is correct.

Respectfully,

T. W. GREGORY,
Attorney General.

Hon. W. P. G. HARDING,
*Governor Federal Reserve Board,
Washington, D. C.*

Certainly under the primary opinion of March 21, 1918, it is ruled that the prohibition of Federal Reserve banks being charged for the collection or payment of checks or drafts and remission therefor by exchange or otherwise results in the Federal Reserve banks being unable to clear or collect checks on banks demanding such payment from them; and that the Federal Reserve act does not command or compel non-member and non-depositing State banks to forego any right they may have under the State laws to make charges in connection with the collection and remission to cover checks drawn on them. If we understand the position of the Federal Reserve Board, it is that the explanatory opinion of the Attorney General, contained in the letter to the Governor

of the Federal Reserve Board above set forth, modified the formal opinion furnished the President dated March 21, 1918, in respect of the power of the Federal Reserve banks to clear or collect checks on banks demanding payment of collection charges. This is an erroneous position. The letter deals with the status of checks deposited for collection as compared with checks received as cash, and places all of them in the same category with respect to collection charges. He assumes that checks thus deposited are drawn either upon member banks or upon non-member banks, *only*, that have availed themselves of the privilege to maintain with the Federal Reserve Bank of their district a balance sufficient to affect the items in transit held by the Federal Reserve Bank. He expressly holds that the paragraph as amended "may be regarded as at least *authorizing* the Federal Reserve Bank to receive on deposit from *non-member depositors* as well as from member banks all classes of checks to be cleared or collected." Nowhere does he modify his formal opinion that, *as to non-member State banks who have not become depositors for clearance purposes*, the Federal Reserve banks can neither clear nor collect checks drawn on such State banks where payment of collection charges is demanded. Instead of following this ruling, the Federal Reserve banks are not only attempting to collect and clear such prohibited checks, but propose to pay any cost, however great, to make collection thereof in the irregular and damaging ways complained of.

This misinterpretation of the ruling of the Attorney General is obvious from the language of the governor of the Federal Reserve Board in Exhibit "A" (Trans., 33, top page):

"It follows, therefore, that if the Federal Reserve banks are to give service required of them under the provisions of section 13 they must in cases where banks refuse to remit for their checks at par use some other means of collection, *no matter how expensive.*"

Contrast this with the following language in the opinion of the Attorney General, *supra*:

"The Federal Reserve Act, however, does not command or compel these State banks to forego any right they may have under the State laws to make charges in connection with the payment of checks drawn upon them. The act merely offers the clearing and collection facilities of the Federal Reserve banks upon specified conditions. If the State banks refuse to comply with the conditions by insisting upon making charges against the Federal Reserve banks, the result will simply be, so far as the Federal Reserve Act is concerned, that since the Federal Reserve banks cannot pay these charges *they cannot clear or collect checks on banks demanding such payment from them.*"

Plaintiffs in this case are not members of the Federal Reserve system; they have not chosen to avail themselves of the facilities for clearing checks through the Federal Reserve Bank by making deposits and maintaining a balance with the defendant (Federal Reserve Bank) sufficient to offset the items in transit held by the Federal Reserve Bank. They demand payment by the Federal Reserve Bank (or any other bank) of the usual service charges for transmitting funds in payment of collection items, as they have always done. According to the Federal Reserve Act as interpreted by the Attorney General of the United States their checks cannot be

cleared or collected by the Federal Reserve Bank. According to the conclusion of the Federal Reserve Board (which has been and is being put into effect in all the Reserve districts) these checks not only can be, *but must be*, cleared and collected by the Federal Reserve banks at par by any means outside of regular channels, no matter how expensive to the Federal Reserve Bank nor how destructive of the State banks. A more complete *non sequitur* of the ruling of the Attorney General could not be imagined.

Analysis of Section 13, Federal Reserve Act.

Nothing prevents a non-member bank from making reasonable charges for payment of checks and remission (of proceeds), whether the same be through the medium of exchange or otherwise.

Checks may be *paid* either in exchange, *i. e.*, (a) by a draft on a deposit with the party entitled to payment, or with a correspondent, payable to the order of such party at par, or (b) may be paid "otherwise" in cash.

So, proceeds of such checks may be *remitted* in exchange as above defined, or may be *remitted otherwise* by transmission of currency by express, or by special messenger, or through the post-office. The words "or otherwise" as used in section 13 of the Federal Reserve Act apply both to payment and to remittance, in the conjunctive—the two amounting to *collection*—and the charges thus become "collection charges."

This is clear from the language of the first proviso of said section 13, which states that collection is but another name for "payment of checks and remission therefor."

The second proviso forbids any "such charges being made against the Federal Reserve banks." This prohibition must be coextensive with the purpose for which said charges are made, viz: "the collection of checks," which is stated in the alternative as "payment of checks and remission therefor." It is important to note that this proviso is an expression of the Congress *subsequent* to the provisions of section 16.

This prohibition has been construed by the Federal Reserve Board on the advice of the Attorney General, *supra*, to mean that a Federal Reserve Bank *cannot legally* pay out of its own funds for the collection and remittance of a check. This interpretation is obviously sound.

It would seem to be the logical conclusion, therefore, that the Federal Reserve Bank cannot legally undertake the collection of a check, *by exchange or otherwise*, that is subject to a collection charge directly against the bank.

Analysis of the Proviso to Section 13, Federal Reserve Act.

All banks are authorized to make reasonable charges for:

(a). *Collection* of checks and drafts and remission therefor by exchange.

(b). *Collection* of checks and drafts and remission therefor otherwise.

(c). *Payment* of checks and drafts and remission therefor by exchange.

(d). *Payment* of checks and drafts and remission therefor otherwise.

BUT

"NO SUCH CHARGES"

"Shall be made against the Federal Reserve banks."

This prohibition is conceded to mean that the Federal Reserve banks *cannot pay any such charges for:*

(a). *Collection of checks and drafts and remission therefor by exchange.*

(b). *Collection of checks and drafts and remission therefor otherwise.*

(c). *Payment of checks and drafts and remission therefor by exchange.*

(d). *Payment of checks and drafts and remission therefor otherwise.*

The Federal Reserve banks invoke this prohibition against payment of such charges to any bank, although a non-member and a non-depositor, and therefore as much without jurisdiction as the express company or any private citizen, and propose to use some other means of collection "No MATTER HOW EXPENSIVE,"

And Pay Any Cost to

<p>(a). The express company (b). The post-office (c). Resident agents (d). Special agents</p>	}	for	{	<p>The collection of checks and drafts and remission therefor by exchange or otherwise.</p>
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The prohibition in the law has no limitation as to the medium through which the charge is made, but is confined to the character of the charge itself, to wit:

Either

1st. For *collecting* checks and drafts and remission therefor by exchange or otherwise,

Or

2nd. For *paying* checks and drafts and remission therefor by exchange or otherwise.

It must follow that if a Federal Reserve bank can require the banks to "deadhead" these charges because it is forbidden to pay them, the Federal Reserve banks can, with equal propriety, require the post-office, the express company, or any unfortunate private citizen whom it might threaten with "financial violence," to collect and remit for its checks without charge. *Reductio ad absurdum.*

The opinion of the Court of Appeals holds that the Federal Reserve Bank had the alternative under the provisions of Section 13 of the Federal Reserve act which prohibits the payment of the cost of remitting proceeds of checks either (a) not to handle such checks at all, or (b) present the same for collection over the counters of the payee banks or through express companies, or through the postoffice. If the effect of the proviso of Section 13 prohibiting charges against Federal Reserve banks for the collection of checks or the remission of their proceeds is tantamount to a prohibition of such

banks from payment of charges for collection of checks and remission of proceeds, as the Attorney General has expressly ruled, then it passes comprehension how the Federal Reserve bank can consistently avoid payment of the very small charge made by banks for the remission of the proceeds of checks through the mails commonly called exchange, and at the same time incur the much greater expense of presenting these checks through personal representatives at all points in the United States, or paying the express company's charges for remitting currency, or the postoffice charges for transmitting funds, and not violate the express terms of the prohibition of the statute. As we have pointed out the prohibition of the statute applies to charges *for collection* as well as to charges *for remittance* and the Federal Reserve bank is prohibited from paying either.

The Court of Appeals opinion then proceeds to admit that if the Federal Reserve bank presented checks on non-member banks by mail it "would have been liable for the reasonable value of such service, except for the statutory inhibition against it." Appellants never contended for anything more than this, and from this premise they argued that since the act forbids the Federal Reserve bank to incur any such liability, it forbids with equal emphasis Federal Reserve banks from handling any such checks whether by mail or through any other channels. In this conclusion we are fortified by the opinion of the Attorney General of the United States hereinbefore quoted. Under this statement with which we do not disagree, can the proviso to section 13 of the Federal Reserve Act be a constitutional law under the fifth amendment which prohibits the taking of private property without due process of law? In other words, can Congress legislate

compulsory rendition of valuable service without compensation? If it cannot do so directly, can it authorize such coercive and irregular business methods as will compel the surrender of such valuable property rights rather than incur business injury of greater magnitude. The Court of Appeals then proceeds to argue that the purpose of the bill is to compel the Federal Reserve bank to avail itself of the service of the State banks. A more complete misconception of the purpose of the bill could not be imagined. It is usual to look for the purpose of a bill in equity to the prayer of the bill. Turning to these prayers beginning on page 28 of the transcript, we find the appellants asking an injunction against the defendants from inaugurating methods of collecting checks drawn against appellants, or either of them, that would prove embarrassing, annoying, and expensive to appellants, and from attempting to collect any check against appellants, except in the usual and ordinary channels of collecting checks through clearing houses, or from in any manner interfering with appellants' legal right to charge usual and customary rates of exchange for compensation of services rendered in remitting for checks sent through the mail. It would seem to follow that if the law of the creation of the Federal Reserve banks forbids their payment of these legal charges the injunction, instead of compelling the Federal Reserve banks to avail themselves of the services of the State banks, would make it impossible for them to enjoy such services. If this is sound, then the subsequent argument found in the opinion of the Court of Appeals that no property right of the appellants was infringed by the refusal of the Federal Reserve bank to avail itself of their services in remitting the proceeds of checks drawn upon them, falls to the ground. If appellants had the

legal right to charge reasonable compensation for services rendered and the Federal Reserve Bank was forbidden to pay such charges it became a legal impossibility for the Federal Reserve bank to avail itself of the services of appellants, and the grant of the relief prayed for would have crystalized this impossibility in the terms of the decree. Not only did appellees not contend that it was the lawful duty of the Federal Reserve bank to accept service at their hands, but they are contending with all their might that the Federal Reserve bank cannot accept such service because, under the interpretation of the Federal Reserve Act by the opinion of the Attorney General, they have no right at all to accept such service without paying for it, and this is forbidden by law.

The Court of Appeals then affirms the contention of the defendants that it was the purpose of Congress to establish a uniform par clearance system in the United States, and that prohibition against payment of exchange charges by Federal Reserve banks was the expression of this purpose. This is a most remarkable conclusion in view of the provisions of the Federal Reserve Act so emphatically saving to all banks in the United States, whether member banks or non-member banks, the right to charge exchange for services rendered in remitting the proceeds of checks. This provision immediately precedes the proviso itself. Congress may consistently have decided, in view of the immense financial transactions, in progress at the date of this amendment to section 13, growing out of the flotation of Liberty bonds, that Federal Reserve banks could not afford to serve as a universal clearing house and pay the legitimate charges for transmission of funds. Congress cannot be convicted of such an absurd purpose as the establishment of true par clearance universally

operating throughout the United States. So long as it costs to transport persons and property, so long will it cost to transport the last expression of property—"the coin of the realm." Congress might as well endeavor to inaugurate universal franks for transporting the mails; universal passes for the transportation of passengers; and universal deadhead for the transportation of freight, as to establish universal par clearance throughout the United States. While the formal specific charge for exchange in transmitting funds between banks doing business in large centers is very commonly omitted, compensation for the service involved in such transmission is none the less paid, in each and every case, either by setoff or by the receipt of corresponding benefits through other channels. In other words, universal par clearance is an iridescent dream, as impossible of accomplishment as the vagaries of the wildest theorist, socialist, or bolshevist. So long as human society is bottomed upon a *quid pro quo*, universal par clearance will remain an impossibility.

Clearing-house Functions.

Exhibit "A" (Transcript, p. 30), which is a formal and official letter from the Federal Reserve Board, and Exhibit "B" (Transcript, p. 34), which is a formal and official letter and declaration from and by the defendant bank, through its governor, each announces a purpose on the part of the Federal Reserve banks, including the defendant bank, to begin to accept checks drawn upon non-member banks and to compel payment thereof at par by the drawees.

The defendant bank undertakes no explanation of the reason for such action, except the general announcement that

justice to the member banks and non-member banks who maintain clearing accounts with the Federal banks, and to the various other banks who are remitting at par, requires the defendant bank, in compliance with the intent of the Federal Reserve act, to begin receiving at par checks and drafts payable on presentation drawn on any bank in the United States, and follows this with a threat to the effect that if par remittance is not consented to, the defendant bank will adopt other methods of collection that will prove "embarrassing, annoying and expensive" to the bank or banks so refusing. However, with each of the letters last mentioned there was enclosed a copy of the letter from the Federal Reserve Board, which is Exhibit "A" to the bill, and therein we find an attempted explanation of the purposes of, and authority and reasons for, the threatened action.

In the last-mentioned letter, the Federal Reserve Board, after calling attention to that part of section 16 which authorizes it, at its discretion, to exercise the functions of a clearing house for the Federal Reserve banks, and to require each Federal Reserve bank to exercise the functions of a clearing house for its member banks, says:

"In accordance with the purpose of this paragraph, the Federal Reserve Board, with the view ultimately of establishing a universal or national system of clearing intersectional balances as well as bank checks and drafts, has established a gold settlement fund through which daily clearings between all Federal Reserve banks are consummated and has also required each Federal Reserve bank to exercise the functions of a clearing house for its member banks. In order, however, to make fully effective its facilities as a clearing house in accordance with the terms of this section,

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there does not seem to be any doubt that the Federal Reserve bank should not only exercise its obligatory power to receive from member banks checks and drafts upon other member banks, but that it should also exercise its permissive power to receive from member banks any other checks and drafts upon whomsoever drawn, provided that they are payable upon presentation."

This means that the Federal Reserve Board has construed the statutory permission granted to it to exercise the functions of a clearing house for Federal Reserve banks, and to require each Federal Reserve bank to exercise the functions of a clearing house for its members, as authority to it to establish "a universal or national system" of bank clearing, and therein to dictate and control that feature of the business of all banks, including non-member banks. In short, from a mere statutory permission to establish a clearing-house system for Federal Reserve banks and their members, the Federal Reserve Board deduces and claims authority to control and direct the entire subject of bank clearance in this country, and therein to dictate as to how banks with which it has no connection whatever will carry on a very important feature of their business.

That the statute relied upon does not even remotely suggest authority for such claim and the threatened action based thereon is manifest. The term "clearing house" has a well-defined meaning, which is the same both in law and in the banking business, and about which there is no uncertainty or question.

"A clearing house is an association, the object of which is to effect at one time and place the daily es-

changes between the several banks which are members, and the payment of the balance resulting from such exchanges."

National Exchange Bank vs. National Bank of North America, 132 Mass., 149.

Philer vs. Patterson, 168 Penn., 468 (32 Atl., 26).

Crane vs. Fourth Street National Bank, 123 Penn., 556 (34 Atl., 269).

In the very nature of the term it embraces, or applies to only the members of the organization which it designates. The basic idea is an association through which the members thereof make daily settlements each with the other. Congress is presumed to have been cognizant of these well-known matters and to have legislated with that information in mind. The term "clearing-house functions," being free from ambiguity and of well-known meaning, the only effect of the statutory provision under discussion is to authorize the Federal Reserve Board to act as a clearing house, the members of which shall be the Federal Reserve banks, and to require each Federal Reserve bank to act as a clearing house, the members of which shall be its member banks, and under every definition of the term "clearing house," the powers of these several organizations would be limited to the making of daily settlements between the members thereof, and could not embrace any control over settlements or adjustments between member banks and non-member banks.

The jurisdiction, powers and functions of a clearing house so organized can differ in no respect from the jurisdiction, powers and functions of a clearing house organized by agreement between the banks of a particular city, and we do

not think that it has ever before been suggested that any clearing house had the slightest thing to do with transactions by its respective members with non-members. In short, the functions of a clearing house are limited to settlements between its members, and it is in no wise concerned with what may be owing to or by any member by or to any party who is not a member. Unquestionably, the Federal Reserve Board has the power to make daily settlements between the Federal Reserve banks, and each Federal Reserve bank has the power to make daily settlements between its member banks, but here all clearing-house functions cease and no Federal Reserve bank should be concerned, or take action, or seek to exert any control, with respect to the liabilities existing between its member banks and those who are not members.

This effort on the part of the Federal Reserve Board to deduce from a statute clearly limited to granting power to establish a system of clearing for Federal Reserve banks and their members authority to establish "a universal or national system of clearing" is a most forcible illustration of that autocratic tendency which seems to be the order of the day.

We submit that there is nowhere in the Federal Reserve act even an intimation of a legislative purpose to authorize the "establishing of a universal or national system of clearing," and that, therefore, all efforts of the Federal Reserve Board and the Federal Reserve banks in that direction, or to that end, or for that purpose, are without authority of law and are clearly *ultra vires*. Such is the declared purpose of the threatened action now being resisted, and if the foregoing reasoning be correct, then a clear case is presented for injunctive relief.

It is well to call attention to an unquestioned rule of statutory construction thus expressed by the Supreme Court of Alabama and supported by the Federal cases there cited:

"One of the cardinal rules in the interpretation of all statutes, is to arrive at the intention of the legislature in the enactment of the law, and to this end the courts will look at the object of the enactment and the mischief or defect against which it is intended to provide. * * * The meaning of the legislature may be extended beyond the precise words used in the law, for the reason or motive upon which the legislature proceeded from the end in view or the purpose which was designed. *U. S. vs. Freeman*, 3 Howard, 565. A thing within the intention of the makers of the statute is as much within the statute as if it were in the letter. *U. S. vs. Babbitt*, 1 Black, 61 (U. S.). The intention of the law-maker constitutes the law. A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. *Atkins vs. Disintegrating Co.*, 18 Wall., 381."

Cocciola et al. vs. Wood-Dickerson Supply Co.,
136 Ala., 536-7 (33 Sou., 856).

Section 13 of the Federal Reserve act permits Federal Reserve banks, at their option or election, to receive on deposit from member banks "checks," without further defining them or prescribing the terms upon which they are to be received. The same section authorizes certain collection charges, but provides that they shall not be made against a Federal Reserve bank. The Attorney General has construed this to mean that a Federal Reserve bank can not legally pay any fee to a member or non-member bank for the collection and remittance of a check. (See his opinion, *supra*.)

Basing the contention upon the provisions just mentioned, the Federal Reserve Board and banks assert that such a bank is prohibited by law from paying even a nominal charge for the collection of checks through the process which has been customary for unnumbered years, but that it has the right to spend an unlimited amount of money to collect them in some other way, and that it will adopt such other means of collection, no matter how expensive. In short, the insistence is that the law prohibits all Federal Reserve banks from paying any money for the collection of certain items by a certain method which has been usual and customary for many years, but authorizes an unlimited expenditure to collect the same items by some other and new method. The law must be presumed to comport with the fundamental ideas of civilization, justice and common sense, and statutes are construed from that standpoint. There is looked for in every legislative enactment some reasonable purpose consistent with a lawful ultimate objective. Statutes never have for their purpose the injury of a particular person or class, or the working out of spite or malice. However, the Federal Reserve Board, in this instance, has construed the prohibition against its paying collection charges as being, in effect a command to deprive the banks of the collection and remitting charges which they have long enjoyed, no matter at what cost, expense or detriment to the Reserve banks. Is this not a legal absurdity? Beyond question, the purpose of the prohibition mentioned was economic and not spiteful or malicious. In other words, the controlling legislative intent was to prevent Federal Reserve banks from spending any money in making the collection referred to, as contradistinguished from preventing the payee banks from receiving compensation, and, under every rule of statutory construction, the prohibition

mentioned includes the very acts and expenditures now threatened and against which plaintiffs complain and protest. To hold that the restriction against the paying of ordinary collection and remittance charges confers authority to spend vastly more to accomplish the same ultimate result by other methods, is to introduce into the statute patently inconsistent and contradictory ideas and to deny to it the only effect which it was intended to produce. Especially forceful is this thought when it is remembered that we deal with a situation wherein these activities on the part of the Federal Reserve banks are entirely voluntary. These banks are deliberately and purposely and of their own volition adopting a course of conduct which, in view of the long-established custom of the small banks to make the charges in question and the actual necessity therefor, necessarily means the incurring of most extraordinary and unusual expense, and now seek to justify such course by claiming that such is the meaning and command of a statute which, in its inherent nature and purpose, was intended to deny to Reserve banks the power to incur expense in collecting checks. Such a construction is a legal impossibility and an unwarranted imputation against the National Congress. Indeed, while there have been indulged in these troublous times many harsh criticisms of Congress, yet it has remained for its creature, the Federal Reserve Board, to officially charge it with the legislative absurdity and iniquity which that board's construction of the statute in question necessarily embraces.

For the reasons above presented, we respectfully submit that the identical statutory provision upon which defendants rely for authority to use "other means of collection, no matter how expensive," or to adopt "methods of collection that would prove embarrassing, annoying and expensive," when

properly construed, clearly denies the existence of any such right and leaves the threatened acts without authority, *ultra vires* and illegal.

It will be noted that while section 16 expressly requires that Federal Reserve banks shall accept at par checks drawn on deposits in Federal Reserve banks, yet, under section 13, the reception of other checks for deposit is entirely optional, and there is no requirement that such other checks, if accepted, be taken at par. Consequently, the Federal Reserve banks have the option of either of two courses with respect to such other checks. They may, as they have done up to this time, decline to accept them, and leave them to be handled through other channels, or they may accept them at a discount sufficient to cover the charges in question, thus so arranging that the said charges will not be "against the Federal Reserve banks." The latter course is entirely feasible and not subject to reasonable objection. From time immemorial the charges in question have been deducted from each such check by the first bank which received the same, thus so arranging that the charge was paid by the party who first banked the check, and who it is presumed received the same in a business transaction carrying a profit justifying such expense. For many years other banks have so handled the said checks, and there is no good reason why the Federal Reserve banks, if they elect to handle them at all, may not pursue the same course.

We again note that section 13 deals with banks that were either members or non-member depositors for collection purposes. The obvious purpose of the proviso to the act is to require all banks in either of these classes to forego collection and remittance charges against Federal Reserve banks. Perhaps Congress had constitutional power to do that

much, though we are not now concerned with that. It recognized its constitutional limitations as to outsiders and, consequently, used the permissive *may* as to authority to handle checks on non-member banks, in section 13, while it used the compulsory *shall* in section 16, as to checks on banks over which jurisdiction was conferred on the Federal Reserve banks. In the former case checks on non-member banks *may* be received for deposit or collection, provided no charge is made for the transmission of their proceeds back to it; but since payment of such charges by a Federal Reserve bank is forbidden if such charge cannot lawfully be prohibited for lack of jurisdiction, the power of the Federal Reserve bank to receive it is likewise forbidden, as ruled by the Attorney General, *supra*.

Congress has said, in effect: "The right of all banks to make reasonable charges for collection or payment of checks and remission therefor is recognized, but no bank over which Congress has jurisdiction shall make such charge against any Federal Reserve bank."

As thus construed the constitutionality of this portion of the act is doubtful, under the limitations of the Fifth Amendment. A construction that would extend this prohibition to any corporation not created by Congress or within the operation of the Federal Reserve Act by reason of membership in, or contract relation with, the Federal Reserve system, would make the act too obviously unconstitutional to require argument. Can the creatures of Congress, by financial violence, oppression and intimidation, through methods however legal in and of themselves when employed in good faith, indirectly exert this power in violation of the Fifth Amendment when their creator cannot do it at all?

Why, then, does the Federal Reserve bank desire to handle these checks and to compel the drawees to remit at par? The true answer to this inquiry has not been expressly stated, but it is too thinly veiled to be concealed.

The real ultimate purpose of the Federal Reserve Board is not that which it directly announces, namely, universal par clearance, but it is to further swell and fatten the already enormous deposits of the Federal Reserve banks, and to center therein the control of the banking business of the entire country, as is fully charged in the bill. In Exhibits "A" and "B," there is the ostensibly friendly suggestion that eligible non-member banks should become members, and that those banks which are not eligible to membership should solve their difficulties by keeping with the Federal Reserve banks deposits sufficient to cover the checks drawn upon them. This, of course, is a direct bid by the Federal Reserve banks for the vast amount of deposits which they necessarily would receive if the suggestions mentioned were adopted. Already the Federal Reserve banks have piled up earnings heretofore unknown in the banking business, and have secured a power and control over the financial resources of the country more comprehensive than anything ever before dreamed of. Those who control these institutions wield a national, even an international, influence, sweeping and far-reaching beyond description. After all, these controllers are but men with the ordinary weaknesses of humanity. The lust for power is insidious and insatiable. It is rarely recognized by its victim, and it is never satisfied. Its favored weapon is oppression, and it does not hesitate to destroy whatever may stand in its way. Such is the situation with which we deal in this case. The Federal Reserve Board and the

Federal Reserve banks desire universal par clearance, not for the direct benefit which it might confer upon any one, but as a means to force into the coffers of these banks further millions of deposits, without regard to the fact that thereby thousands of useful small Country Banks will be either destroyed or crippled and their splendid field of usefulness restricted or abolished.

Congress never intended to center the financial power of the nation in the Federal Reserve system. The act speaks its purposes, and they were clearly defined in public debate, both in and out of Congress, during the making of the law. There then was never a thought or a suggestion that the system, whose beneficent purposes were well understood, should be converted into a financial octopus, with ever-extending and strengthening tentacles enveloping, maiming, or destroying all or any part of the country's magnificent system of banking. If Congress did not intend that the Federal Reserve system and the Federal Reserve banks should become such an instrument, then each act and effort of those managing the system and the banks to bring about that result is unauthorized and *ultra vires*, and we respectfully submit that the bill in this case, with the exhibits thereto, show beyond question that the ultimate purpose of the threatened action now being resisted is to compel all banks to carry with the Federal Reserve banks deposits sufficient to cover all checks upon them which may reach the Federal Reserve banks, and thus to increase by untold millions their already swollen deposits.

A court of equity is a court of conscience. It abhors sham and indirection. It searches the motive and seeks the substance through all the manifold disguises of form. No cor-

poration can overawe it by size and power, and no sophist can deceive it by specious pleas. In the application of these everlasting principles of right and justice it sometimes reduces the composite of human conduct to its component elements and dissipates it because the poison of illegality, fraud, or bad faith inheres in one or more of the elements. In other cases it will forbid the ultimate injurious compound if it contains the vice of unconstitutionality as a whole, although each constituent element in and of itself is strictly legal. Harmless elements often combine into rank poison. A court of equity would not ordinarily enjoin a man from striking a match to light his pipe—a thing innocent in itself, but if he proposed to do it in a powder magazine the action of the court would be influenced by other considerations.

So equity would not ordinarily enjoin the holder of checks on a bank from presenting them for payment over the counter in usual and ordinary course for the usual and ordinary purposes of getting their proceeds; but if these processes were employed for the ulterior purpose—openly avowed—of compelling the bank to give up additional property or property rights to which it was confessedly entitled under the law, through fear of more disastrous consequences reasonably to be expected from the methods employed in collecting such checks, the court should be influenced by other considerations.

We submit:

(1) That the declared purpose of the threatened acts, that is, the establishing of universal par clearance, is unauthorized and *ultra vires*, and that, therefore, the said acts are illegal.

(2) That the said acts are in and of themselves unauthorized and illegal, because they contemplate and involve expenditures in direct conflict with the purpose and intent of the statute.

(3) That the actual, as distinguished from the declared, ultimate purpose of the threatened acts is not only unauthorized and illegal, but also involves the creation of a substantial and serious national menace through the perversion of a beneficent statute.

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Supreme Court of the United States

OCTOBER TERM, 1920

No. 679

AMERICAN BANK & TRUST COMPANY, ET AL.,

Appellants,

vs.

FEDERAL RESERVE BANK OF ATLANTA, GA., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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CLERK

Supreme Court of the United States, D. C.

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NOTE: A number of decisions of Federal and State Courts bearing on the jurisdiction of United States Courts in cases brought against Federal Corporations are collected in a foot note 12

(28,036)

In the Supreme Court of the United States

October Term, 1920

No. 679

AMERICAN BANK & TRUST COMPANY, *ET AL.*,
Appellants,

vs.

FEDERAL RESERVE BANK OF ATLANTA, *ET AL.*,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE.

The American Bank & Trust Company, and other banks incorporated under the laws of the State of Georgia, brought a suit in equity in the Superior Court of Fulton County, Georgia, against the Federal Reserve Bank of Atlanta and certain of its officers as individual defendants. Other banks, incorporated under the laws of various of the States in the Sixth Federal Reserve District, subsequently intervened in the litigation as parties plaintiff. The prayers of the bill were for injunction and other extraordinary relief in equity, (record, pp. 28-30) and will be hereinafter more fully commented upon.

The defendants presented to the State Court a timely petition for removal, wherein it was alleged, in the language of the statute, that the cause was of a civil nature

in equity arising under the Constitution and laws of the United States, and that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of \$3,000.00. (Record, pp. 44-47.)

The Federal nature of the controversy was averred in the petition for removal to inhere in the fact that one of the defendants, to-wit: Federal Reserve Bank of Atlanta, was a corporation organized "in pursuance of and obedient to that certain Act of Congress known as the Federal Reserve Act". In an amendment to the petition for removal, seasonably filed, it was alleged that the case arose under the Constitution and laws of the United States, because the same involved a determination of the construction, application and effect of that certain Act of Congress known as the Federal Reserve Act, and amendments thereto, and for other reasons set out in the amended petition for removal, (record, pp. 55-57) hereinafter considered.

A bond with good security, duly conditioned as required by the statute providing for the removal of causes, was presented to the State Court along with the petition for removal.

Counsel for plaintiffs interposed in the State Court a demurrer to the petition for removal, in which were raised issues of law which were heard and determined in the State Court. After argument said demurrer was overruled and the cause was thereupon ordered by the State Court to be removed to the District Court of the United States for the Northern District of Georgia.

After removal of the cause, counsel for plaintiffs filed in the District Court of the United States a certain motion to remand (record, pp. 75-81), based upon contentions which may be briefly summarized as follows:

(1) That the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the United States District Courts, and, (2) that the same was not a suit of which the District Courts of the United States are given original jurisdiction under the Constitution and laws of the United States.

The defendants (appellees at bar) filed in the District Court their motion, in the nature of a general demurrer, to dismiss the bill upon the following grounds (record, pp. 82-83) viz: :

That the same did not state any matter of equity entitling plaintiffs to the relief prayed against the defendants, or any one or more of them; because the said bill was wholly without equity, in that the averments of issuable facts set out therein were insufficient to entitle the plaintiffs to the relief in and by said bill prayed; because said bill showed on its face that the threatened acts on the part of the defendants, and each of them, to enjoin which said bill was sought to be maintained, were lawful and could not be urged or set up under well settled principles of equity as the basis upon which to predicate the prayers for extraordinary relief in said bill contained; because the said bill, stripped of the simple conclusions of the pleader, charged no facts and contained no averments sufficient to entitle the plaintiffs, or any one of them, to the relief in equity sought in said bill.

On March 24, 1920, the plaintiffs filed in the District Court an amendment to their said bill, which was, by order of Court, allowed. (Record, pp. 63-75.)

The motion to remand, filed by the plaintiffs, and the motion to dismiss for want of equity, filed by the

defendants, were heard together in the District Court and, after argument of Counsel, the said Court, the Honorable Beverly D. Evans presiding in the place of the Honorable Samuel H. Sibley, who had recused himself, entered, on April 29, 1920, two certain orders or decrees, the one overruling the motion to remand, the other dismissing the bill for want of equity. (See transcript of record, pp. 99-101, with opinion of the Court, pp. 101-104.)

The plaintiffs thereupon took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, assigning error upon the said decrees of the District Court. (Record, pp. 106-108.)

The issues of law made in and by said appeal were heard at the October Term, 1920, of said Court at Atlanta, before a Court constituted of the Honorables Richard W. Walker and Nathan P. Bryan, Circuit Judges, and the Honorable William I. Grubb, District Judge. The said Court did, after a consideration of said appeal, and in an opinion filed November 19, 1920, affirm, in all respects, the decrees of the District Court complained of. (See record, pp. 120-127, for the opinion of the Circuit Court of Appeals.)

The appeal at bar is from the judgment and decree of the Circuit Court of Appeals affirming the District Court. Said appeal involves the identical issues of law which were before the Circuit Court of Appeals, viz: whether the District Court of the United States had jurisdiction of the cause and, whether the bill of the plaintiffs, as amended, stated a cause of action in equity.

The appellants have filed in connection with their appeal to this Honorable Court twenty-four assignments of error. Without undertaking at this time any detailed

analysis of the assignments of error, we desire to call the attention of the Court to the fact that many of the specific assignments of error purport merely to attack propositions of law and illustrations stated and used by the Court *arguendo* in reaching the conclusion that the District Court properly entertained jurisdiction of the cause on removal and properly dismissed the bill for want of equity. We respectfully submit that while the Court of Appeals logically developed its decision through the statement of sound legal and equitable principles, and while the illustrations used by the Court in pointing the arguments advanced in support of its decision, were apt and timely, it is to the correctness of the decision that this Court will direct its attention rather than to the argumentative portion of the decision under review. The substantial questions now at bar present but two propositions for determination, viz:

(A) *The jurisdiction of the District Court.*

(B) *The sufficiency of the bill, as amended, to state a cause of action in equity.*

All of the many assignments of error must, in the last analysis, relate to one or the other of these two propositions, or else they have no relevancy in a consideration of the matter at bar. We shall, therefore, confine this argument to the law touching these two basic propositions and not undertake to discuss specifically and *seriatim* every particular assignment of error. Regardless of the form in which the assignments of error are framed, and of the collateral issues attempted therein to be raised, the fact is that the District Court, by its decree, refused to remand the cause after removal and, then having retained jurisdiction, dismissed the bill as being wholly wanting in equity. The Court of Appeals decided that the District Court was correct as to both propositions of law.

BRIEF OF THE ARGUMENT.

A.

The Jurisdiction of the District Court

For the convenience of the Court, we state next below the relevant provisions of those two sections of the Judicial Code of 1911 affecting the jurisdiction of United States Courts and the removal of causes, viz: Sections 24 and 28:

"Sec. 24. The District Courts shall have original jurisdiction of all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," etc.

"Sec. 28. Any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the District Courts of the United States are given original jurisdiction may be removed by the defendant or defendants therein to the District Court of the United States for the proper district."

It is the contention of appellees that the suit, as brought by the plaintiffs, was one arising under the laws of the United States, therefore, that a District Court of the United States would have had original jurisdiction thereof had the plaintiffs seen fit to institute the same in a District Court, hence, the requisite jurisdictional amount being involved, the cause was properly removable.

The suit arose under the laws of the United States for two reasons:

(1) Because of the fact that one of the defendants sued was a corporation organized and existing under the laws of the United States and,

(2) Because it appears from the allegations of the bill, filed by the plaintiffs, that the issues, therein presented for determination, necessarily involved the construction of a Federal statute, not incidentally or collaterally merely, but as an essential part of the case, inevitably involved in any adjudication of the case as undertaken to be made and relied upon by the plaintiffs.

1.

Plaintiffs' Case Arose Under the Laws of the United States Because It was Brought Against the Federal Reserve Bank of Atlanta, a Corporation Under the Laws of the United States.

A Federal question was made in this case *ipso facto* because the Federal Reserve Bank of Atlanta is a corporation created and organized under and pursuant to an Act of Congress, to-wit: The Federal Reserve Act.

As long ago as *Osborn vs. Bank of the United States*, 9 Wheat., 738 it was settled by this Honorable Court that a suit by or against a corporation, chartered under or by an Act of Congress, is one arising under a law of the United States, and this, because, as we said in that case, pages 823, 825:

"The charter of incorporation not only creates it (the corporation) but gives it every faculty which it possesses. The power to acquire rights of any de-

scription, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank the Act of Congress is its foundation. The contract could never have been made, but under the authority of that Act. The Act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter."

When the *Pacific Removal Cases* (115 U. S. 1) were decided by this Court, May 4, 1885, the Court again held that "Corporations of the United States, created by and organized under Acts of Congress," like the plaintiffs in error in those cases, "are entitled as such to remove into Circuit Courts of the United States suits brought against them in the State Courts." The Court based this opinion "on the ground that such suits are suits 'arising under the laws of the United States'". In the *Pacific Removal Cases* this Court said:

"We do not propose to go into a lengthy argument on the subject; we think that the question has been substantially decided long ago by this court. The

exhaustive argument of Chief Justice Marshall in the case of *Osborn vs. Bank of the United States*, 9 Wheat., 738, 817-828, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States."

On this proposition of law there has never been any question and, with respect thereto, there now exists no ground for debate.

The ruling in the case of *Osborn vs. Bank of the United States*, *supra*, has been uniformly recognized and applied down to the present time. As recently as 1915, this Court, in the case of *Bankers Trust Company vs. Texas & Pacific Railway*, 241 U. S. 295, 306, said *arguendo*:

"The ruling just quoted (i. e., the excerpt from *Osborn vs. Bank* above set out) was uniformly followed and applied in suits against Federal corporations, save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enactment."

As illustrative of the uniformity of the application of said ruling, the Court cites in the *Bankers Trust Company* case the following (page 306):

Pacific Removal Cases, 115 U. S. 1;

Petri vs. Commercial National Bank, 142 U. S. 644, 648;

Butler vs. National Home, 144 U. S. 64;

Northern Pac. R. R. vs. Amato, 144 U. S. 465, 471;

Texas & Pac. R. R. Co. vs. Cox, 145 U. S. 593, 601;

Washington & Idaho R. R. vs. Coeur d'Alene Ry.,
160 U. S. 77, 93;

Knights of Pythias vs. Kalinski, 163 U. S. 289, 290;

Tex. & Pac. Ry. vs. Swearingen, 196 U. S. 51, 53;

Matter of Dunn, 212 U. S. 374, 383-384.

In the case of *Texas & Pacific Railway Company vs. Cody*, 166 U. S. 606, decided April 19, 1897, the Court, speaking through Mr. Chief Justice Fuller, held that the Texas & Pacific Railway Company, being a Federal corporation, might remove into the proper Court of the United States a suit brought against it in the State Courts of Texas, although the defendant Company was described in plaintiff's petition as being "a private corporation, created and existing under the laws of the State of Texas," upon the theory that the defendant, being in fact a Federal corporation, could not be deprived of this privilege of removal, because in the action brought against it the defendant was "by some mistake or otherwise erroneously stated to be created under State laws."

There are a number of decisions of this Court similar to the case of *Texas & Pacific Railway Company vs. Swearingen*, 196 U. S. 51, and *Knights of Pythias vs. Withers*, 177 U. S. 260, wherein jurisdiction of the United States Courts upon removal has been accepted as a matter of course because the defendant was a Federal corporation.

To cite to the Court all of the decisions wherein this proposition of law has been recognized and applied, or in which jurisdiction has been accepted without question because the defendant was chartered under an Act of Congress, would unnecessarily encumber this brief and would serve no useful purpose.

The unbroken line of cases, all to the same effect, presents the settled law of jurisdiction in all cases where a Federal corporation is a party (and no specific Congressional enactment *contra* exists), to such an extent indeed that in some of the later cases, such as *ex parte Roe*, 234 U. S. 70, this Court accepts the proposition as too well settled to permit of argument or controversy.

Nor is the right of removal altered or in anywise affected by the fact that some of the defendants may be individuals and citizens of plaintiff's State. This is made perfectly plain by this Court in "*Matter of Dunn*", 212 U. S. 374. That case was decided upon an application for a writ of *mandamus* arising out of a suit originally instituted in the State Courts of Texas, in which a Federal corporation and certain individuals were joined as parties defendant. The defendants united in a petition to remove the cause to the District Court of the United States for the Northern District of Texas on the ground that the cause arose under the laws of the United States, in that one of the defendants was a body corporate under such laws. A motion to remand having been refused, the application for *mandamus* was made and upon a consideration of the same this Court sustained the jurisdiction of the District Court, holding that where the United States Court has jurisdiction by reason of the fact that the defendant is a corporation created by an Act of Congress, the joinder of other defendants, citizens of plaintiff's State, does not prevent a removal if there is no separable controversy and all of the defendants unite in the petition; in other words, that the Federal character permeates the entire case and affects all parties defendant. The *Dunn* case was followed by this Court in the case of *Texas & Pacific Railway Company vs. Eastin*, 214 U. S. 153, 159.

The above stated ruling, respecting the Federal character of litigation instituted by or against Federal corporations, has permeated the entire line of decisions, State and Federal, relating to the jurisdiction of the United States Courts. As illustrative of the unanimity of the decisions on this point, we cite a few of the decisions of the Circuit or District Courts, of the Circuit Courts of Appeal, and of the State Courts in a foot note.* These cases are typical of numerous others that might be referred to and, as above set out, are adverted to in this argument for the reason that they indicate the extent to which the rulings of this Court in this regard have entered into and become a part of the fundamental law.

In view of the above cases, the authoritative nature of which cannot be doubted, it would appear that the only other matter for inquiry upon this immediate phase of the case would be the question of whether or not Congress has withdrawn this right of removal from Federal Reserve Banks by some specific enactment. Counsel for appellants argued in the Courts below that the various Acts of Congress fixing the citizenship of national banks,

* Union Timber Products Company vs. United States Shipping Board Emergency Fleet Corporation, 252 Fed. 320; Ingram Day Lbr. Co. vs. United States Shipping Board Emergency Fleet Corporation, 267 Fed. 283; Supreme Lodge, etc., vs. Wilson, 66 Fed. 785; Wood vs. Drake, et al., 70 Fed. 881; United States Freehold Land & Emigration Co. vs. Gallegos, 89 Fed. 769 32 C. C. A. 470; Supreme Lodge Knights of Pythias vs. England, 94 Fed. 369, 36 C. C. A. 298; Union Pacific R. R. Co. vs. McComb, 1 Fed. 799; Van Brimmer vs. Tex. Pac. Ry. Co., 190 Fed. 394; Bowers vs. First National Bank of Mountainhome, Idaho, 190 Fed. 676; Larabee vs. Dolley, 175 Fed. 365, 384; Martin vs. St. Louis S. W. Ry. Co., et al., 134 Fed. 134. Choctaw, etc., R. Co. vs. Hendricks, 21 Okla., 140, 95 Pac. 971. (The proposition of law is conceded, arguendo, by the Supreme Court of Texas in the case of Tex. & Pac. Ry. Co. vs. Gay, 86 Tex. 582, 25 L. R. A. 54, 26 S. W. 601.) (The only Federal cases apparently contra found are the cases of Meyers vs. Union Pac. R. R. Co., 16 Fed. 292, and Adams Express Co. vs. Denver, etc., R. R. Co., 16 Fed. 712, both decided by Judge McCrary. The case of Meyers was reversed by the Supreme Court of the United States in the Pacific Removal cases.)

for jurisdictional purposes, in the States in which they are respectively located applies to Federal Reserve Banks, and the same question is made in this Court in certain of the assignments of error, viz: in assignments numbered 2, 5, 6, 7 and possibly in other of such assignments of error. This question will be presently considered in this argument.

Counsel, however, furthermore advanced in argument before the Circuit Court of Appeals, the remarkable contention that the decisions of this Court, extending in an unbroken line from *Osborn vs. Bank*, *supra*, to *Bankers Trust Company vs. Tex. & Pac. Ry. Co.*, *supra*, should be disregarded because of some change said to have been wrought by the Judiciary Acts of 1887 and 1888 in the law theretofore affecting the removal of causes brought against Federal corporations. The same contention is made at bar, particularly in assignments of error 4, 8 and 10. The contention of appellants in this regard seems to be that Federal corporations, even though not otherwise prevented from so doing by some specific enactment, can, under the Judiciary Act of 1888, invoke the primary jurisdiction of the Federal Courts only in cases wherein they are plaintiffs; that in cases brought in State Courts against such Federal corporations they have no right of removal, because the fact of the Federal incorporation of the defendant is insufficient to make the case one "arising under the laws of the United States."

In other words the contention is that the case of *Tennessee vs. Union and Planters Bank*, 152 U. S. 454, wherein this Court held that under the Act of August 13, 1888, no suit might be removed as one arising under the laws of the United States unless that appears by the plaintiff's statement of his own claim, limits the jurisdiction of United States Courts on removal to cases in which

the plaintiff seeks to enforce a right conferred directly by a Federal Statute. Hence they say that under the *Union and Planters Bank* case the fact of the Federal Incorporation of the defendant is insufficient to make the controversy a removable cause, *although the Federal Corporation could still invoke the primary jurisdiction of a District Court as a plaintiff in any case involving the requisite amount.* In making such contention appellants not only utterly mistake the true import of the *Union and Planters Bank* case but also seek to set at naught the many decisions of this Court (some of which are cited above), which establish the proposition that any suit brought against a Federal corporation is *ipso facto* one arising under the laws of the United States.

Confronted with the unmistakable decisions of this Court on this precise question, made in a score of cases, decided both prior and subsequent to the Judiciary Act of 1888, Counsel sought in the brief filed for appellants below to avoid the binding force of these decisions by a statement in their brief that their view "of the effect produced by the Acts of 1887-8 on the primary jurisdiction of Federal Courts does not appear to have occurred to Court or counsel in any of the decided cases."

The cases as decided by this Court speak for themselves, and it is neither our purpose nor province to attempt to justify the authoritative pronouncements upon this question which have been consistently made throughout a period almost co-incidental with the life of this Court.

In view of the fact, however, that the point is made in the record, we simply desire to call the attention of the Court to the fact that since the Judiciary Acts of 1887-8, this Court has more than once squarely upheld

the jurisdiction, upon removal, in cases where the defendant was a Federal corporation, and the Federal nature of the controversy inhered solely in the fact of such incorporation. For example, we refer to the case of *Washington & Idaho R. R. Co. vs. Coeur d'Alene Ry.*, 160 U. S. 77, decided by this Court December 2, 1895. Suit was originally instituted in the District Court of Idaho by the Washington & Idaho R. R. Co. against Coeur d'Alene Ry. et al, and was removed by the defendants to the United States Circuit Court for the District of Idaho. In its opinion, at page 92, the Court used the following language:

"The Circuit Court of Appeals maintains the jurisdiction of the Circuit Court on the ground that there was a Federal question involved, in the fact that the Northern Pacific Railroad Company, a corporation created by the laws of the United States, was a party to the action. We agree with that Court in regarding such a fact as conferring jurisdiction on the Circuit Court."

In the case of *Tex. & Pac. Ry. Co. vs. Cody* (decided by this Court April 19, 1897) 166 U. S. 606, Mr. Chief Justice Fuller, who rendered the decision for the Court, used the following language:

"There is no controversy over the fact that the defendant corporation owed its existence to acts of Congress, and was entitled to remove the cause as one arising under the laws of the United States in accordance with the decision of this Court in *Pacific Railroad Removal Cases*, 115 U. S. 1; but the railway company expresses apprehension lest we may hold that jurisdiction was not maintainable within the rule laid down in *Tennessee vs. Union & Planters' Bank*, 152 U. S. 454, and other cases, because plaintiff

below did not allege that defendant was a Federal corporation, but rather the contrary."

"The rule thus referred to * * * is that under the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, a case not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings."

Then, after calling particular attention to the Act of 1887-8, which appellants contend entirely withdrew the right of a defendant Federal corporation to remove, upon the ground of its Federal origin, a case brought against it in a State Court to the United States Courts, and after citing the *Union and Planters Bank Case* upon which appellants now base such contention, this Court held specifically that the *Texas & Pacific Railway Company* had the right of removal, even though the fact of its Federal incorporation was only known to the Court judicially, and did not appear from the averments of the bill of complaint.

In view of the *Cody* case, we respectfully submit, it cannot be properly said that this Court has consistently and repeatedly adhered to the rule in *Osborn vs. Bank*, *supra*, and in the *Pacific Railroad Removal Cases*, *supra*, because the "effect" of the Acts of 1887-8 has not heretofore "occurred to the Court." We submit, furthermore, that the opinions and judgments of this Court in the various cases, wherein it has been held that the fact of Federal incorporation of one of the parties *ipso facto*

makes the case one arising under the laws of the United States, are cogent and judicially sound beyond any controversy. It borders on the absurd to say that a suit instituted by a Federal corporation is of a Federal nature because of the Federal origin of the plaintiff, but that the suit loses its Federal character, within the meaning of the statute providing for the removal of causes, where such Federal corporation is a party defendant.

When this case was before the Circuit Court of Appeals this particular contention of appellants was disposed of as follows: (See opinion of Court, record p. 121.)

"We think the United States District Court had original jurisdiction of the cause of action for both of the reasons assigned. The case of *Osborn vs. Bank of the United States*, 9th Wheat. 738, supported by many subsequent decisions of the Supreme Court, settles the question of the jurisdiction of the Federal Court in cases in which one of the parties is a corporation, which owes its creation to an Act of Congress, unless another Act of Congress has withdrawn such jurisdiction. Nor is it important whether the Federal incorporation occupied the position of plaintiff or of defendant in the action. This is true unless a long line of Supreme Court decisions, in which jurisdiction was sustained upon this ground, without reference to the position of the corporation in the line-up of the parties, be disregarded. From this, follows the right of a Federal incorporation, made a defendant in a cause in a State Court, to remove the cause to the Federal Court, unless prohibited by an Act of Congress."

The Right of Removal Was Not Affected by the Statutes Restricting the Jurisdiction of United States Courts in Cases Involving National Banks as Parties Litigant.

As heretofore mentioned, Counsel for appellants also contend that even though the right of removal might exist in favor of the Federal Reserve Bank of Atlanta in the absence of a statutory enactment to the contrary, Congress has heretofore enacted statutes, the effect whereof is to deprive the defendants in this case of the privilege of removal, for the reasons aforesaid otherwise existing, to-wit: the following Statutes of the United States:

1. The Act of July 12, 1882, c. 290, which provides as follows:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby repealed." 22 Stat. 163.

2. The Judiciary Act of March 3, 1887, corrected by the Act of August 13, 1888, c. 866, Sec. 4, providing as follows:

"That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, per-

sonal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 25 Stat. 433.

3. That portion of Section 24 of the Judicial Code of 1911, defining the jurisdiction of the District Courts of the United States, which provides in part as follows:

"Sixteenth. (Of suits against National Banking Associations.) Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purpose of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." 4 Fed. Stat. Ann. (2d Ed.) pages 840-841.

We have quoted for the convenience of the Court the original statute fixing and defining the jurisdiction of Courts of the United States in suits by or against national

banks, as well as subsequent re-enactments of the same, although it is probable that the Judicial Code embodies the only law which should properly be considered in this immediate connection. The portion of the Judicial Code, next above quoted, relates to the same subject matter affected by the Act of 1882, thus operating as a repeal of that statute and of all former statutes on the same subject. In fact, it has been decided by the Circuit Court of Appeals of the 8th Circuit, in the case of *George, et al., vs. Wallace, et al.*, 135 Fed. 286, that the Act of March 3, 1887, corrected by the Act of August 13, 1888, operated to displace the earlier Act of 1882. (See also *Herrmann vs. Edwards*, 238 U. S. 107, 111.) Upon similar principles, it would seem, therefore, that the Judicial Code has displaced and superseded all prior legislation on the same subject.

The above quoted statutes are said by the appellants to be applicable to the matter at bar, because they provide in effect that the jurisdiction of the United States Courts shall no longer be invoked on the ground that a national banking association is a corporation under the laws of the United States, and because it is contended by the appellants that the defendant Reserve Bank is a "national banking association" within the meaning of such statutes.

It is the contention of appellees, on the other hand, that the said statutes have no relevancy to this case for the reason that the defendant Federal Reserve Bank of Atlanta cannot be brought within the purview of the same by any reasonable or logical construction thereof.

In so far as national banks are concerned, the rule as to the jurisdiction of United States Courts in litigated matters where a national banking association is a party,

is stated in the case of *George, et al., vs. Wallace, et al., supra*, as follows:

"It was not the purpose of Congress, by either of these acts, to wholly deprive the Circuit Courts of jurisdiction of suits by or against national banks arising from the subject matter thereof. A suit which may be brought in a Circuit Court by or against a citizen of a State because it arises under the Constitution, laws, or treaties of the United States, may for the same reason be brought in such court by or against a national bank located in the same State (citing *Petri vs. National Bank*, 142 U. S. 644, 647). All that was intended was that jurisdiction should no longer be asserted solely on the ground of the Federal origin of such banks—merely because of the source of their incorporation. In respect to jurisdiction they are to be considered as though they were organized under the laws of the States in which they are respectively located."

If the defendant Federal Reserve Bank of Atlanta is, as we contend, not a national banking association within the meaning of the statutes aforesaid, then, obviously the decisions of the courts upon the question of jurisdiction, in cases where national banks are involved, are not applicable *per se*. But even though it should be held that the defendant Reserve Bank is within the purview of these statutes, the District Court of the United States would still have had jurisdiction of this particular matter under the above quoted rule, as laid down in the case of *George, et al., vs. Wallace, et al.*, for the reason that, as will hereinafter appear, other Federal questions which are independent of those questions which arise immediately out of the fact of Federal incorporation of the defendant Reserve Bank and are of a nature authorizing a removal, are involved in this controversy.

For the present, however, we shall confine the argument to the proposition that the Federal Reserve Bank of Atlanta is not a national banking association within the meaning of said statutes.

What was the intent of Congress with respect to the class of institutions or associations included within the restrictive statutes aforesaid?

It is an elementary rule of legal interpretation that any statute is to be so construed as to give effect according to the purpose and intent of the law-maker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. See *Sutherland on Statutory Construction*, Vol. 2 (2d Ed.), par. 363, *et seq.*, with cases cited in support of the text.

We respectfully submit that it cannot be urged with any logic or reason that Congress had within its contemplation, when enacting those statutes, corporations of the class to which the defendant Reserve Bank belongs. Counsel for appellants urge that the language of the statute is broad enough to include the defendant Reserve Bank. They argue that the defendant is a bank, that it is chartered by an Act of Congress, that it is national in character—hence a national bank. The precise term used in said statutes to designate the corporations affected thereby is the term “national banking associations.” It is argued by the appellants that the word “association” is simply the legal equivalent of the word “corporation” and that, therefore, the Act was intended to apply, and does apply, to any national banking corporation.

Appellees contend, on the other hand, that even a cursory examination of said statutes forces the conclu-

sion that the effect of the same is not to shut off the right of removal, otherwise clearly existent in favor of the Federal Reserve Bank of Atlanta. At the respective times these several statutes were passed, two of the same re-enacting a former statute, the Congressional intent must have been directed toward institutions of a particular kind, to-wit: national banking associations. All through the statute law affecting national banks, institutions of the kind which are popularly and commonly known as national banks, are technically and precisely described and designated as "national banking associations." We may take it as beyond dispute, therefore, that the precise legal designation of a national bank is the term "national banking association." That terms means, when applied, a national bank—a commercial bank of discount dealing with the public. It would have been impossible for Congress, in framing the said statutes now invoked by appellants, to have employed a term more precisely designating those institutions which are commonly referred to as national banks. The term "national banking association" has a definite, precise meaning. No doubt or ambiguity exists in any part of the statute law, wherever the term "national banking association" is used. It logically and naturally suggests to the mind the familiar commercial bank, chartered under an Act of Congress, one or more of which does business in almost every city or town in the United States. All through the law affecting national banks, reserve banks, and other financial institutions organized under Acts of Congress, the same phrase is used without any uncertainty or resulting confusion. Anyone studying or reading any United States statute affecting national banks, reserve banks, or other Federal financial institutions, knows what is meant whenever the term "national banking association" is employed, knows that national banks and not reserve banks are thus designated.

The Federal Reserve Act carefully preserves the distinction between national banks and reserve banks, and in the first section of the Act distinctly provides: "Wherever the word 'Bank' is used in this Act, the word shall be held to include State bank, banking association, and Trust Company, except where national banks or Federal Reserve Banks are specifically referred to. The terms national bank and national banking association, wherever used in this Act, shall be held to be synonymous and interchangeable."

An acceptance of the position of counsel for plaintiffs in this regard as tenable would inevitably involve a construction of every provision of the law, applicable in terms to "national banking associations," as being applicable to Federal Reserve Banks. This would bring about a manifest absurdity in interpretation and, as the Circuit Court of Appeals said (record, p. 122), would "lead to unforeseeable consequences." An acceptance of appellants' construction of these statutes would also entail, upon identical principles, a construction of the national banking laws as applicable in every part and provision to any other financial institution of a Federal character, as for example, Federal Farm Loan Banks and Federal International Banking Corporations, institutions of both of said classes being banks incorporated under respective Acts of Congress.

It is impossible, in the course of this argument, to review in detail the entire national banking act, but a mere casual reading of the same will show that it contains many provisions made applicable to all "national banking associations" which could not be fitted to Federal Reserve Banks. We respectfully contend that it would lead to absurd, and even dangerous results, if portions of the general statute law affecting "national

banking associations" were so interpreted as to make the same affect only national banks, while other portions of the statute law were so interpreted as to make the term "national banking association" applicable to any bank chartered under a law of Congress. In other words, all of the provisions of the national banking act could not be appropriately or safely made applicable to Federal Reserve Banks as a class, "yet the same reasoning that would apply the limitation of jurisdiction imposed upon national banks to reserve banks would make it necessary to apply all of the limitations against and grants in favor of national banks to reserve banks." (Opinion Circuit Court of Appeals, record, p. 122.) The words "national banking association," as used in the above quoted Act of 1882 and its successors must, we respectfully submit, be regarded as words designating institutions then within the contemplation of Congress, or those of a kindred nature that might thereafter be created, and not as constituting a generic term covering the whole range of financial institutions operating under a Federal charter.

National banks are banks of discount and deposit for commercial purposes, dealing with the public. They receive deposits from the public, make loans to individuals and corporations, exercise usual and ordinary banking functions, and come directly into competition with other institutions of like character, chartered by State authority. The Federal Reserve Banks, on the other hand, are *sui generis*, having no exact counterpart in the financial system of any other country. The number of such banks is limited by the statute creating them. The authority to form such Federal Reserve Banks flows directly out of the Federal Reserve Act, as approved December 23, 1913. Even the location of such banks is subject to change from time to time in ways provided by law. They are *quasi*

governmental institutions. The classes of permitted stockholders therein are carefully limited by law. Their operations are limited by law. They do not discount for the public, but only for member banks. They are banks, it is true, in a broad general sense, but entirely different in character and functions from ordinary commercial banks, State or National. Their operations extend over circumscribed territory, subject to change. It would be an anomaly to regard such corporations for any purpose as being properly in the same class with national banking associations.

National banking associations are organized by individuals, under certain restrictions and limitations, and are subject to the provisions contained in the national banking act, as amended from time to time. There are more than 7,500 of such national banking associations in the United States. They each have an office fixed by charter in a particular town or city. They each enter directly into the economic life of that particular community, and there are obvious reasons why such banks should, for practical purposes, be regarded as citizens of the States in which they are located. No such considerations apply to Federal Reserve Banks. The reasons which might have actuated Congress to pass the statutes aforesaid, fixing for jurisdictional purposes, the citizenship of national banks, could not, because of the utter dissimilarity of the two kinds of institutions, enter into a consideration of the propriety of cutting off from Federal Reserve Banks the privilege of suing and being sued in the Federal Courts, in cases where the requisite jurisdictional amount is involved.

Reserve Banks belong to a class, small in number, acting as governmental fiscal agencies, with no general clientele. National banks belong to a class necessarily numerous, serving the public generally.

In the face of these considerations, however, counsel for appellants assert that because Congress, by a statute passed in 1882 and re-enacted from time to time, has seen fit to deny to national banking associations the privilege of suing and being sued in the Federal Courts, except under conditions where State corporations might invoke the jurisdiction, Reserve Banks should be considered as falling within the terms of these statutes simply because they are banks, national in character, although never termed in-legal nomenclature anywhere in the statute law, or in the decisions, or even by common business usage, or in every day parlance, "national banking associations." Reserve Banks could not possibly have been in contemplation of the legislative body when these statutes were passed, because the same were not then in existence, and no institution resembling a Federal Reserve Bank, or exercising similar functions, had ever been conceived of as a part of our financial system.

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." See *Sutherland on Statutory Construction*, Vol. 2 (2d Ed.), page 376.

"While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words." *Pierce vs. Van Dusen*, 78 Fed. 693, 696 (C. C. A. 6th Circuit).

"Where general language construed in a broad sense would lead to absurdity, it may be restrained."

People vs. Davenport, 91 N. Y. 574, cited in *Sutherland on Statutory Construction*, par. 376, *supra*.

The case of *Church of the Holy Trinity vs. United States*, 143 U. S. 457, decided by this Court on February 29, 1892, adjudicates the same principle. In that case the Court had before it for construction the Act of February 26, 1885, "To prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," etc. It appears from the statement of facts that the Church had engaged a rector and minister who was an alien residing in England, under contract, whereby he was to remove to the city of New York and enter into its service as rector and pastor. This Court held that even though the case had come within the literal meaning of the Immigration Act, it would be an absurdity to apply the statute to a rector, under contract as aforesaid.

In the *Holy Trinity Church case*, the Court speaking through Mr. Justice Brewer, used the following language (page 463) :

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy ; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body," citing *U. S. vs. Union Pacific Railroad*, 91 U. S. 72, 79.

It follows logically from the statements of law, as contained in the above authorities, that in interpreting these several statutes of Congress cutting off from national banks the right to remove to the United States Courts those cases which could not be removed by a defendant State bank, the intent of Congress must be considered and regarded and a reasonable, rational construction given

to the acts. It is respectfully submitted that the legislative intent would be perverted, not effectuated, by an interpretation of these statutes which would treat as a generic phrase, the term "national banking association," instead of considering these words as they should be considered, viz: as designating, precisely and exactly, the class of institutions called national banks, and known throughout the body of the relevant statute law, then and now, as national banking associations.

2.

Other Federal Questions are Made by Plaintiffs' Bill Independent of Those Arising by Reason of the Source of Incorporation.

Upon the authority of *Osborn vs. Bank, supra*, and *Pacific Removal Cases, supra*, and of the numerous decisions of this Court in line with these cases, it would appear to be wholly unnecessary to enter into a discussion of whether or not other Federal questions were involved in this controversy entitling the defendants to a removal of the cause. We shall, however, draw attention briefly to other averments of the petition for removal, as amended, with supporting authorities, and to the allegations of plaintiffs' bill upon which the averments of additional Federal questions, contained in the amended petition for removal, were based, the purpose of such discussion being to demonstrate to the Court that even though the Federal Reserve Bank of Atlanta is to be regarded as within the limitation of jurisdiction imposed by statute upon national banks, this cause would nevertheless be a removable controversy.

The lower Courts have held that the cause, as originally brought by appellants, "presents for decision the proper

construction of the provisions of the Federal Reserve Act," and that "it was presented in the plaintiffs' own statement of their cause of action * * *and not as a suggested or anticipated defense which the defendants might be expected to set up as an answer to the plaintiffs' cause of action;" that "the solution of this question depends upon the construction to be given Sections 13 and 16 of the Federal Reserve Act, and not merely to a charter power of the defendant bank." (Record p. 123, Court of Appeals decision; record p. 103, District Court's decision.)

The assignments of error touching this proposition of law are numbered 1, 3, 9 and 10.

The petition for removal, as amended, avers that the cause arises under the laws of the United States because a consideration thereof necessarily involves a determination of the construction, application and effect of the Federal Reserve Act; that the cause arises under the laws of the United States because the plaintiffs seek to enjoin the defendants from exercising powers claimed under a Federal law; that the plaintiffs' bill presents a Federal question in that the same avers that the defendants are performing the acts complained of under the direction of the Federal Reserve Board, organized and created under the said Federal Reserve Act, and that the conduct of said defendants so complained of is upon a claim of rights and powers conferred under and by virtue of said Federal Reserve Act; that said bill denies the said powers and rights and thus undertakes to set up and declare a right to restrain the exercise of the powers which the defendants claim are drawn from said Federal Reserve Act; that the bill presents a Federal question because it appears therefrom that in order to maintain the same the Federal Reserve Act must be construed to the end that it may be ascertained from such construction the extent

to which said Act, as amended, confers authority upon the said defendants and, also, upon the Federal Reserve Board, to do and perform the acts sought in said bill of injunction to be restrained.

Analyzing the bill for the purpose of determining the nature of the issues therein attempted to be made, and whether the same are Federal or non-Federal in character, we find that the bill reviews in some detail the legislation pursuant to which the Federal Reserve Banks were established, and the reasons for the establishment of such institutions, the plaintiffs undertaking to define and elucidate some of the fundamental powers and functions of the Federal Reserve Banks, and the purposes for which they are operated.

In paragraph 30 of the bill, the specific charge is made that the original design and purpose of said banks has been in a large measure perverted. In paragraph 31 it is alleged that the defendant Reserve Bank, *acting under the policy announced by the Federal Reserve Board*, has determined to compel State institutions in the Sixth Federal Reserve District to become members of said Federal Reserve Bank.

The bill sets out the contents of a certain communication issued by the Federal Reserve Board at Washington to a bank not a member of the Federal Reserve System, "defining its conception of the law and policy relative to the collection of bank checks and drafts at par," which conception of the Federal Reserve Board of the law and policy relative to the collection of bank checks and drafts at par, the bill draws into controversy. The bill also makes reference to a certain letter issued by the officers of the defendant Reserve Bank touching their intention to undertake to collect checks at par, for the account of

members of the Federal Reserve System. drawn upon all banks in the Sixth Reserve District.

It is alleged in paragraph 43: "Petitioners deny the jurisdiction of the defendant Reserve Bank in its corporate capacity, and of each individual defendant under the cover of their official connection with it, over any bank created by the sovereign State of Georgia, which has not voluntarily submitted to said jurisdiction," and, further, "regardless of the construction or interpretation of the Federal Reserve Act, petitioners are advised by counsel and therefore allege that Congress has not power even by a direct, explicit and mandatory enactment to coerce them or other State banks in like condition against their will to submit to the jurisdiction of defendant Reserve Bank, either as members or non-member banks. There is no warrant in law for perverting the Federal Reserve Act into an instrument of autocratic tyranny to compel petitioners and other banks created by the State of Georgia to sacrifice their charter rights and legitimate revenues, etc."

Then follow certain allegations the purport whereof is that the defendants, under the alleged cover of the Federal Reserve Act, are intending to employ methods of collecting checks, claimed by the plaintiffs to be autocratic and tyrannical. The alleged acts of oppression set out in the bill are described as being acts "proposed to be exercised by the defendants hereto, operating in the name but outside the power of the defendant Reserve Bank created by Congress for a purpose entirely foreign to any such objects and purposes."

In paragraph 56 it is alleged that "said efforts to coerce petitioners and other banks in like situation through the instrumentality of said defendant Reserve

Bank are illegal, oppressive and unwarranted by the charter powers and functions of said bank."

It is submitted that a simple reading of the bill will demonstrate the proposition that no determination thereof would be possible without a complete construction and application of the Federal Reserve Act. In paragraph 27 the plaintiffs specifically undertake to construe the Federal Reserve Act as expressly recognizing the propriety of charging for the collection and remittance for checks through correspondents, and say that the right they claim is recognized and provided for in the Reserve Act itself. It is asserted throughout the bill that the corporation and its officers are acting *ultra vires* the powers of the Bank. It is alleged that the defendants are undertaking to oppress the plaintiffs under the cover of rights claimed to exist by virtue of the Federal Reserve Act, which powers and rights the plaintiffs deny throughout the bill.

The meaning, effect and tenor of the Federal Reserve Act is made by the bill the subject matter of controversy and dispute—the plaintiffs even claiming that the rights which they undertake to assert by their bill are protected and recognized by the Federal Reserve Act itself, and, further, that the Reserve Act, if nominally made mandatory in any respect upon them, is beyond the power of Congress.

Plaintiffs, therefore, involve a construction of an Act of Congress in the very warp and woof and essential fabric of the case, which they themselves lay and undertake to assert. Notwithstanding, however, that the case in its very vitals centers and turns on the Federal Reserve Act, the plaintiffs say that their bill involves no Federal question within the meaning of Section 24 of the Judicial Code, because the rights which they assert are not based upon

any act of Congress, but as they say, are undertaken to be asserted despite the Act of Congress.

It is, of course, a principle of law recognized and well defined since the passage of the Judiciary Act of 1888, that the existence of a Federal question must appear from the plaintiff's bill or petition, as distinguished from its presentation by the defendant's pleadings, before a defendant can legally avail himself of the privilege of removing a cause upon the ground that it arises under the Constitution or laws of the United States. This does not mean, however, that it is essential that the basic rights attempted in the plaintiff's pleadings to be asserted must grow directly out of a Federal law. In other words, a plaintiff may present in his petition or bill a Federal question, even though the claimed right is not directly conferred by a statute of the United States. Thus, it is apparent that a Federal question arises not only when the claimed right is based upon Federal law, but also when it appears that the right of recovery may be defeated by a construction of a Federal statute which may fairly be contended for. The case presents a Federal question, we contend, when it becomes necessary to construe the Constitution, laws or treaties of the United States in order to reach a correct decision of the material issues, or to decide as to the existence of some right, title, privilege, claim or immunity asserted under the Federal Constitution and laws. (See Simkins on Federal Equity Suits, page 138.) The same author states the rule in another form, thus: "The suit must be such that some right, privilege, immunity, or title on which recovery depends will be defeated by one construction of the Constitution or laws, or sustained by a contrary construction." (id. p. 138.)

It follows, therefore, that it is too narrow a statement of the rule to say that the test of jurisdiction is solely whether or not the fundamental right asserted by the plaintiff grows directly out of a statute of the United States. The right to invoke the primary jurisdiction of the United States Courts exists whenever the plaintiff, in and by his pleadings, undertakes to set up a cause of action which may be defeated by one construction of a statute of the United States, or upheld by another.

Authorities are hereinafter cited which, we think, sustain these general statements of law. We do not contend that in cases where the Federal statute is invoked by the defendant solely as a matter of defense, or that in cases where the construction of a statute be only collaterally involved, or that in cases where a decision of the cause may be had without a construction of such statute, although it may be incidentally involved, the case is one arising under the Constitution or laws of the United States. In any such event the case does not necessarily involve a construction of the laws of the United States, even though it may be apparent from the plaintiff's pleadings that eventually such construction may be brought into the litigation. The case is, however, one arising under the laws of the United States whenever it is apparent from the plaintiff's pleadings that the plaintiff's claimed rights cannot be adjudicated without the construction of a Federal law. In other words, where the right of recovery may be sustained by one construction and defeated by another, and where no decision of the case is possible except upon a construction of a Federal law.

The foregoing statements as to the tests to be applied in determining whether or not a Federal question be involved in this litigation (independent of those Federal questions which arise out of the fact of Federal incor-

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poration), we think are sustained by the following authorities:

"A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction." *Osborn vs. Bank of United States*, 9 Wheat. 738, 822.

We quote the following from the case of *Railroad Company vs. Mississippi*, 102 U. S. 135, 140:

"It is settled law, as established by well considered decisions of this Court, pronounced upon full argument and after mature deliberation, notably in *Cohens vs. Virginia*, 6 Wheat. 264; *Osborn vs. Bank of United States*, 9 id. 738; *Mayor vs. Cooper*, 6 Wall. 247; *Gold-washing & Water Company vs. Keyes*, 96 U. S. 199; and *Tennessee vs. Davis*, 100 U. S. 257
* * *

"That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either:

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the

party, in whole or in part, by whom they are asserted;

"That, except in the cases of which this court is given by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly,

"That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Also, the following from the case of *California Oil & Gas Co., of Arizona, vs. Miller, et al.*, 96 Fed. 12, 16:

"Two things are necessary to the existence of a Federal question: First, an actual dispute between the parties as to the meaning of some law of the United States; second, materiality of the construction of such law to a determination of the cause. These two constituents have been succinctly stated thus:

"'A cause is not removable simply because in its progress it may become necessary to construe or apply an act of Congress. Unless there is a dispute between the parties as to the meaning of the act, there is no federal controversy between them. The decision of the case, or some material issue in it, must depend upon the construction of the act claimed by one party and denied by the other. A simple averment that

such is the fact is stating a conclusion, and is not sufficient; the facts that show it to be true must be set out.' *Fitzgerald vs. Railway Co.*, 45 Fed. 812; *State vs. Chicago, M. & St. P. Ry. Co.*, 33 Fed. 394. See also, *Water Co. vs. Keyes*, 96 U. S. 199; *Gibbs vs. Crandall*, 120 U. S. 106, 7 Sup. Ct. 497; *Metcalf vs. Watertown*, 128 U. S. 589, 9 Sup. Ct. 173; *City of New Orleans vs. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905."

We quote the following from the case of *Northern Pacific Railway Company vs. Soderburg*, 188 U. S. 526, 528, decided at the October term, 1902, by this Court:

"If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress with the contingency of being sustained by one construction, and defeated by another, it is one arising under the laws of the United States." Citing *Doolan vs. Carr*, 125 U. S. 618; *Cooke vs. Avery*, 147 U. S. 375.

It is claimed by appellants that the authorities above cited are not applicable to this case, in view of a line of cases which have been decided by this Court following the case of *Tennessee vs. Union and Planters Bank*, 152 U. S. 454. In that case the Court held simply that, under the Act of August 13, 1888:

"The courts of the United States have no jurisdiction, either original or by removal, from a State court of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim."

Under the Act of March 3, 1875, it had been held that it was sufficient to justify removal by the defendant if

the record at the time of the removal showed that either party claimed a right under the Constitution or laws of the United States, but in the case of *Tennessee vs. Union and Planters Bank*, the Court held, as above set out, that the Act of 1888, allowing removals from State Courts to United States Courts to be made by defendants only, and of "suits of which the Circuit Courts of the United States are given original jurisdiction" had the effect of limiting the jurisdiction of the Circuit Courts of the United States on removal by the defendant to such suits as might have been brought in that Court by the plaintiff under the first section of the Act.

We recognize, of course, the rule that the Court must look to the plaintiff's statement of the case in determining the presence or absence of a Federal question in the litigation in cases where jurisdiction of the United States Courts is sought upon a claim that a sufficient Federal question is involved. It follows naturally, that a sufficient Federal question would not be involved if the plaintiff, in the course of his pleadings, merely called the attention of the Court to facts from which it might be inferred that the defendant would rely upon a Federal statute, or upon something arising out of a Federal statute in defense of his actions. The cases cited by the appellants, similar to or following the case of *Tennessee vs. Union & Planters Bank*, *supra*, go no further and could, under the law, go no further than to hold that unless the plaintiff himself makes a case involving directly the construction of a Federal statute, without which construction the suit could not be decided upon the issues raised by him, there would be no primary jurisdiction of the controversy in the United States Courts. If, on the other hand, the plaintiff does make a case which cannot be decided without a direct construction of the effect and meaning of a Federal statute, then all of the authorities which we have here-

inbefore cited in this division of the argument are directly applicable and, in so far as the older cases are concerned, they are as completely applicable as if they had not been adjudicated prior to the passage of the Act of 1888.

Appellants have fallen into the error of assuming that the legal effect of the Judiciary Act of 1888, as construed by this Court in the case of *Tennessee vs. Union & Planters Bank*, *supra*, was to narrow the jurisdiction of the United States Courts, upon removal, to such cases as a plaintiff might bring based upon rights directly conferred by a Federal statute. Appellants entirely overlook the other class of cases of which Courts of the United States have primary jurisdiction, viz: those cases in which some title, right, privilege or immunity asserted by the plaintiff will be defeated by one construction of a law of the United States or sustained by an opposite construction. A case falling within the latter class just as truly arises under a law of the United States as though the plaintiff had instituted the suit to protect a right or title flowing directly out of an Act of Congress.

This proposition of law, entirely overlooked by appellants, is discussed by District Judge Wolverton in the case of *State of Oregon vs. Three Sisters Irr. Co.*, 158 Fed. 346, 348. As a part of this argument, we adopt the following excerpt from that case:

"It may be premised as a legal principle, now firmly settled, that to warrant the removal of a cause from a state court into the Federal Circuit Court as one arising solely under the Constitution, laws, and treaties of the United States, the condition or the fact that it so arises must be made to appear from the complainant's statement of his own claim, and not only this, but his bill or declaration must show a case of that character so that an inspection of the

record thus limited and circumscribed must determine whether there is cause for removal. *Tennessee vs. Union & Planters Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Postal Telegraph Cable Co. vs. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Oregon Short Line, etc., Ry. vs. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; *Galveston, etc., Railway vs. Texas*, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017; *Third St. & Suburban Railway vs. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766; *Minnesota vs. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. The more difficult thing to determine, however, is when and under what conditions a Federal question is involved. The following form of statement relative to the subject has the uniform sanction of the Supreme Court of the United States: I quote from the language of Mr. Justice Waite, in *Starin vs. New York*, 115 U. S. 248, 257, 6 Sup. Ct. 28, 31, 29 L. Ed. 388:

"If from the questions it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not."

"Numerous cases are cited in support of the principle. The Act of 1887, as corrected by the Act of 1888, has not changed the law relative to the particular subject, so that the principle is as readily applicable now as under the old statute."

We refer to another recent case, viz: *Macon Grocery Co. vs. Atlantic Coast Line*, decided by this Court in 1904

and reported in 215 U. S. 501. In that case, the Court in deciding that the controversy then before it was one arising under the Constitution and laws of the United States, considered the jurisdictional question in the light of the earlier authorities, and based the right of the United States Courts to take jurisdiction of the cause upon some of the very cases which are cited in this brief. The following excerpt is taken from the opinion of the Court in the *Macon Grocery Company* case, and embodies a partial summary of the authorities as therein reviewed by the Court (id. 506):

"In *Patton vs. Brady*, 184 U. S. 608, 611, discussing the question as to when a case may be said to arise under the Constitution of the United States, the Court observed;

" 'It was said by Chief Justice Marshall that a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. *Cohens vs. Virginia*, 6 Wheat., 264, 379; and again, when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction. *Osborn vs. Bank of United States*, 9 Wheat. 738, 882. See also, *Gold-Washing & Water Co. vs. Keyes*, 96 U. S. 199, 201; *Tennessee vs. Davis*, 100 U. S. 257; *White vs. Greenhow*, 114 U. S. 307; *Railroad Company vs. Mississippi*, 102 U. S. 135, 139. In *Tennessee vs. Davis*, 100 U. S. 257, the court said:

" 'What constitutes a case thus arising was early defined in the case cited from 6 Wheaton (*Cohens vs. Virginia*). It is not merely one where a party comes into court to demand something conferred upon him

by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const. Sec. 1647. It was said in *Osborn vs. Bank* (9 Wheat. 738), when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. And a case arises under the laws of the United States, when it arises out of the implication of the law.' "

We may take it, therefore, as settled by the recent adjudications of this Court that where the case as made by the plaintiff substantially involves a dispute as to the meaning and construction of a Federal statute, and that where the asserted right of the plaintiff will be upheld by one construction or defeated by another, the Courts of the United States have jurisdiction of the controversy. We may also take it as settled that where the plaintiff's statement of his own case presents issues which will be decided upon a construction of a law of the United States, then such Federal question becomes an essential part of the matter before the Court, and the long line of authorities following the case of *Osborn vs. Bank* are now applicable to the same extent that they were applicable at the respective times of adjudication.

The only change wrought by the Act of 1888 was to limit the Court in its determination of the existence or non-existence of a Federal question in the controversy to an examination and consideration of the plaintiff's pleadings. If from that examination it develops that a Federal question be involved in the litigation generally, but not necessarily or properly in the adjudication of the plaintiff's rights, then the defendant could not remove the cause, because the same would not properly be maintainable in the Federal Courts as an original proposition. In other words, a cause cannot be removed from a State Court simply because in the progress of the litigation it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between parties in regard to the operation and effect of a law of the United States upon the facts involved. (*Gold-Washing & Water Co. vs. Keyes*, 96 U. S. 199, 24 L. Ed. 654.)

Therefore, if, for example, a plaintiff might bring a suit in ejectment, complete in itself, merely alleging therein by way of stating an anticipated defense that the defendant would rely in support of his title upon a grant of the United States, the case presents as to such plaintiff no controversy Federal in character, because the suit may not properly turn upon the validity of the grant. Upon similar principles it has been held, that in cases where the plaintiff simply alleged that the defendant would rely for his defense upon some right growing out of or connected with a statute of the United States no Federal question is raised which will support the jurisdiction of the Federal Court. In such cases obviously, *the meaning and import* of the United States statute is not the turning point of the controversy nor is its construction any part

of the plaintiff's case. But where, as in the case at bar, the plaintiff brings suit alleging in terms a controversy which could not possibly be determined on its merits except through a full, exhaustive and complete construction and application of an Act of Congress, the suit is clearly within the jurisdiction of the United States Courts.

If a Federal Act be not involved, why do the plaintiffs so elaborately and exhaustively discuss the Federal Reserve Act in their pleadings? Why was it considered necessary to allege, not once, but several times, that the defendants were acting *ultra vires* the Bank's charter, perverting the objects and purposes of the Federal Reserve Act—invading the rights of the plaintiffs under the color of authority conferred by the Federal Reserve Act, even asserting that if the Federal Reserve Act be susceptible of the interpretation placed thereon by the defendants, the act itself was beyond the power of Congress to enact?

Logically considered, the bill undertakes to assert that the terms and provisions of a Federal statute are being violated and perverted to the grave and imminent damage of a large number of State banking corporations. The rights of the plaintiffs must be determined and fixed by the application of an Act of Congress. This is the criterion in the case, as brought by the plaintiffs, by which must be measured and adjudicated the respective rights of the parties. The case which they bring turns wholly and completely upon the Federal Reserve Act. It centers in that act. To say that jurisdiction does not exist because the rights asserted do not grow directly out of the Act in the limited sense that the statute is not as to the plaintiffs an enabling statute conferring a new and direct statutory right, is to attempt to narrow the test

of jurisdiction beyond the limitations of any previous case.

We respectfully urge, therefore, that the bill as brought makes a case arising under a law of the United States and presents questions of a Federal character which are independent of those questions which grow immediately out of the Federal incorporation of the appellee Bank, and that, therefore, under the authorities hereinbefore cited, the right of removal would exist in this case, even though it should be held that the Federal Reserve Bank of Atlanta is a national banking association within the meaning of those several Acts of Congress fixing the citizenship of such associations for jurisdictional purposes in the States wherein such associations respectively do business.

Summing up, then, the argument which we have made upon the propositions of law involved in the motion to remand, we repeat that the right of removal in this case exists because of the Federal incorporation of the Reserve Bank of Atlanta, a party defendant to the original bill; that this right of removal, which appertains to all Federal corporations and is incidental to the possession of a national charter, has not been curtailed, abridged or taken away by any Act of Congress; that the statutes fixing the citizenship of national banks for jurisdictional purposes in the respective States in which they are located apply to national banks and to no other class of corporations, and that Federal Reserve Banks are not national banks within the meaning of these statutes; that the Act of August 13, 1888, the effect whereof, as decided by this Court, is to limit the jurisdiction of Courts of the United States upon removal of cases (as arising under the Constitution or a law of the United States) to such as show the existence of a Federal question in the plain-

tiff's statement of his own claims, in no wise affects the adjudications of this Court to the effect that any suit against a Federal corporation is one arising under the laws of the United States. We contend, furthermore, that the bill as filed by plaintiffs involves, essentially and fundamentally, the question of the construction, operation, effect, and application of the Federal Reserve Act; that the plaintiff's right to recover is dependent upon such construction and application, and that, therefore, Federal questions are made in the case which would be effective to confer jurisdiction on the Federal Court, even were the fact of Federal incorporation to be regarded as insufficient, in and of itself, to present the requisite jurisdictional element.

The petition for removal alleges, in the language of the statute, that the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum or value of \$3,000.00. This allegation is not controverted by the appellants; on the contrary, "the jurisdictional amount is conceded to be present." (See opinion of the Circuit Court of Appeals, record p. 120.) Furthermore, the motion to remand is in the nature of a demurrer and, therefore, the allegation of the existence of the requisite jurisdictional amount stands admitted in this record.

It is believed that the above and foregoing presents a statement and argument of all important legal questions which were involved in the motion to remand.

B.

The Bill of Appellants Considered On Its Merits.

It is the contention of appellees that the District Court of the United States for the Northern District of Georgia properly dismissed, upon motion, the bill as filed below by appellants, for the reason that the same was wholly

without equity. The plaintiffs were not entitled to the injunction prayed for the following reasons:

First, There were no proper allegations in the bill of a conspiracy or of unfair competition. Plaintiffs, on the contrary, alleged, in legal effect, that the defendants were preparing to do a legal thing in a legal way.

Second, The "threatened acts" alleged in plaintiffs' bill to be in contemplation of the defendants were within the spirit, letter and intent of the Federal Reserve Act.

1.

There was No Error in Dismissing the Bill for Want of Equity.

In determining whether or not plaintiffs' bill set out a cause of action in equity, the allegations of same must, of course, be weighed and tested, in connection with the prayers for relief. For the convenience of the Court, we quote in full the plaintiffs' prayers for equitable relief: (Record pp. 28-30.)

"1. That the defendants herein be served with the process of this Court as is usual in such cases.

"2. That injunction both interlocutory and permanent be granted against said defendants and each of them, their officers, agents, attorneys, messengers, or other media of action preventing them from using, inaugurating or attempting to use, inaugurate or adopt any method of collecting checks drawn against petitioners or either of them that would prove embarrassing, annoying and expensive to petitioners.

"3. That injunction both interlocutory and permanent do issue against defendants and each of them,

as aforesaid, enjoining them from collecting or attempting to collect any check against petitioners or against any other bank in like condition who may become a party hereto except in the usual and ordinary channel of collecting checks through correspondent banks or clearing houses, said channels being well established and well understood by defendants and all others familiar with the banking business.

"4. That pending the hearing on said prayer for injunction, this Honorable Court may grant a restraining order as usual in such cases restraining the defendants and each of them, their agents and servants, from adopting or attempting to adopt any method of collection of checks drawn against these petitioners, or against any bank in like condition who may become a party hereto, in any manner that would prove embarrassing, annoying and expensive to the bank upon which said check is drawn, or in any manner other than the ordinary channels and processes for collection of checks now in force and well understood in banking circles.

"5. Petitioners further pray that the injunction and restraining order hereinbefore prayed for may be so worded as to prevent the defendants or either of them from in any manner interfering with petitioners or any other bank who may become a party hereto, from charging the usual and customary rate of exchange for compensation of service rendered in remitting for checks sent through the mail.

"6. That petitioners may have such other and further relief in the premises as may be meet and proper."

The Court will note that the appellants seek by a writ of injunction to prevent the appellee bank from collecting checks drawn on any of the appellants in any way or by any method except that specifically pointed out in the bill, viz: "except in the usual and ordinary channel of collecting checks through correspondent banks or clearing houses." More comprehensive and far reaching prayers could scarcely be conceived of. As pointed out by the Circuit Court of Appeals, (Record, p. 126) "the effect of the writ prayed for would be to entirely prevent the appellee bank from collecting checks in any other way than by transmission to the drawee bank, and the remission of the proceeds by the drawee bank through the mails; and so to prevent their collection by presentation over the counter even though presented regularly and without accumulation."

It is apparent from a study of the bill (Record pp. 1-37) that no cause of action is stated which would entitle the plaintiffs to the relief sought, and that the amendment (Record pp. 63-75) adds no actionable element thereto. It is the contention of appellees that if those parts of the bill which undertake to allege ultimate issuable facts be considered, independent of the conclusions of the pleader, it must be determined that the very acts which the plaintiffs charge as being in intendment are lawful and proper acts, and that the conclusions attempted to be predicated thereon are unwarranted in law and unsound in fact, and that therefore, the bill was properly dismissed.

Examining the bill, we find that it is charged therein that the defendants propose to do one or more of specific acts, all designed to secure the collection of checks at par when in the hands of the Reserve Bank for collection. One method is to accumulate checks, drawn on the petitioning banks or other banks refusing to remit to the

Reserve Bank through the mails at par, until the aggregate thereof reached a large amount, then to send a special messenger to the counter of such bank on which said checks are drawn, and demand payment thereof in currency over the counter. Another method said to be in contemplation of the defendants is to present such checks through an agent, either the Express Company, the local postmaster, or an agent specially retained for the purpose.

These are the sole allegations, concerning or touching overt acts, which are made the predicate for the relief sought. It is true that the bill alleges in general terms that "there may be other methods of oppression in preparation by defendants designed to force submission of petitioners, and other banks in like condition, to their will, of which petitioners are not informed," but we regard this allegation as being too indefinite under any rule of pleading to need any consideration. (*Francis vs. Flinn*, 118 U. S. 385, 388.) So that we may consider the bill as charging an intent on the part of defendants to do the simple acts above enumerated.

It is respectfully submitted that a mere reading of these allegations will demonstrate that the "threatened acts" are simple, lawful acts, which any person might do with full warrant of law. A bank check is an order drawn by a depositor, directed to the bank and ordering the bank to pay the holder of the check, if entitled thereto, a sum certain in money. The direction is plain and specific and, but for business usage, the ordinary course of procedure would be to have the holder of every check present the same to the payee bank in regular course, and receive over the counter the money called for by the check. If the check be plain, unambiguous, without limitation or restriction, the primary obligation of the bank

is to honor the same when it is presented by any person lawfully entitled to make presentation.

These elementary propositions need no citation of authority, although authority might doubtless be found in support thereof. So that, at the outset of the argument on this phase of the case, we lay it down as the first proposition relied on, that the threatened acts charged are entirely valid and lawful, considered in and of themselves. Even conceding the truth of the allegations that the defendants had intended to present checks which represented several days' accumulation, this would not alter the soundness of the above statement. The holder of a check, be he holder in due course for value, or holder as an agent for collection, at his option may make presentation thereof promptly or else delay presentation if he be willing to take the risk of a delayed presentation. The bank on which the check is drawn cannot complain of a lack of diligence in making prompt presentation at its counter for payment.

The letters written respectively by the Governor of the Federal Reserve Board and by the Governor of the Federal Reserve Bank of Atlanta, attached to the bill as exhibits "A" and "B," constitute the basis upon which the plaintiffs undertake to make specific charges of acts threatened in violation of appellants' rights. These letters, we contend, cannot properly be regarded as furnishing the basis for such charges. The letter of the Federal Reserve Board contains a plain, precise statement of the policy of the Board in the matter of collecting checks, based upon the Federal Reserve Act, as construed by the Attorney General of the United States.

In order fully to understand these two letters, it may be helpful to examine the provisions of the Federal Re-

serve Act upon which the letter of the Federal Reserve Board was based. The Federal Reserve Act (*Act of Dec. 23, 1913, ch. 6, 38 Stat. L. 251; as amended Sept. 7, 1916, 39 Stat. 752, ch. 461; and June 21, 1917, 40 Stat. 232, ch. 32*) contains two sections which embody provisions applicable to this case.

First: Section 13, the relevant portion of which is as follows:

"Any Federal Reserve Bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national bank notes, Federal Reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing notes and bills; or, solely for purposes of exchange or of collection, may receive from other Federal Reserve Banks deposits of current funds in lawful money, national bank notes, or checks upon other Federal Reserve Banks, and checks and drafts, payable upon presentation within its district, and maturing notes and bills payable within its district; or, solely for the purposes of exchange or of collection, may receive from any non-member bank or trust company deposits of current funds in lawful money, national bank notes, Federal Reserve notes, checks and drafts payable upon presentation, or maturing notes and bills; PROVIDED, Such non-member bank or trust company maintains with the Federal Reserve Bank of its district a balance sufficient to offset the items in transit held for its account by the Federal Reserve Bank; PROVIDED, FURTHER, That nothing in this or any other section of this Act shall be construed as prohibiting a member or non-member bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10

cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; *but no such charges shall be made against the Federal Reserve Banks.*

Second: Section 16, the relevant portion of which is as follows:

"Every Federal Reserve Bank shall receive on deposit at par from member banks or from Federal Reserve Banks, checks and drafts drawn upon any of its depositors, and when remitted by a Federal Reserve Bank checks and drafts drawn by any depositor in any other Federal Reserve Bank or member bank upon funds to the credit of said depositor in said Reserve Bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons. The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal Reserve Bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal Reserve Bank;

"The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal Reserve Banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal Reserve Banks, or may designate a Federal Reserve Bank to exercise such functions, and may also require each such bank to

exercise the functions of a clearing house for its member banks."

By Section 13 of the Act, above quoted, any Federal Reserve Bank is given the right to receive from its member banks, from any non-member bank or trust company which maintains with such Federal Reserve Bank a balance for purposes of clearing, and for purposes of collection and exchange from other Federal Reserve Banks, deposits of money or negotiable paper, including *checks and drafts payable upon presentation within its district.*

In the same section, commercial banks are given the right to make reasonable charges, "not to exceed 10 cents per \$100 or fraction thereof, based upon the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise," but the law specifically provides that "no such charges shall be made against the Federal Reserve Banks."

It may here be properly said, parenthetically, that it is conceded by the appellants in this case that the proviso: "No such charges shall be made against the Federal Reserve Banks," precludes the Federal Reserve Banks from making collection of checks drawn on non-member banks in such a way as to involve the payment of what are called "exchange" charges. Indeed, the appellants go further. They go beyond the language of the statute and contend that the effect of this provision of law is actually to make it illegal for any Federal Reserve Bank to incur any expense of any kind in connection with the clearing and collection of checks. This latter contention will be hereinafter answered.

In Section 16 of the Act, above quoted, it is provided that the Federal Reserve Board may require each Federal Reserve Bank "to exercise the functions of a clearing house for its member banks."

Acting under said provisions of law above quoted, and adopting the only possible construction of the same, the Federal Reserve Board, and the Federal Reserve Bank of Atlanta, respectively, wrote the said two letters which plaintiffs attach to their bill as exhibits "A" and "B." Those letters lay down two premises about which there can be no argument or controversy:

First: That the Federal Reserve Banks have the legal right and corporate capacity to handle, for the account of those using its clearing facilities, checks, although drawn upon non-member banks and,

Second: That if they exercise this legal right to make such collections, they must do so in such a way as not to incur the payment of any charges made by the drawee bank for what is denominated "its service in remitting."

The object of the bill as filed by the plaintiffs, is to enjoin the carrying into effect of the policy of the Board, as set forth in said two letters. So that, the plaintiffs admittedly move in this litigation to prevent the Federal Reserve Bank of Atlanta from handling for collection and clearing any check drawn on any bank which refuses to make voluntary remittance at par through the mails or through correspondent banks, in part upon the theory that it is illegal for the Federal Reserve Bank of Atlanta to make collection in any way which may cause any inconvenience or monetary loss to the appellants or any of them.

Do the said two letters, exhibits "A" and "B," respectively, set up an intention to do any unlawful act, or any lawful act in an unlawful way?

When the Federal Reserve Board announced its policy with respect to the collection and clearing of checks, as alleged in plaintiffs' bill, it announced, as we contend, in simple unequivocal language its intention to follow the terms of the law and undertake for the member banks of the Federal Reserve System, and the business and commerce of the country generally, the collection of checks at par through the various Federal Reserve Banks, regardless of whether such checks were drawn on member or non-member banks.

The letter of the Federal Reserve Board refers to the provisions of law above set out, and draws therefrom the conclusion that the Federal Reserve Banks have the right to receive on deposit from any of their member banks, or from other Federal Reserve Banks, any checks or drafts upon whomsoever drawn, provided they are payable upon presentation. The letter clearly sets out the fact that the provision of law, to-wit: "no such charges shall be made against Federal Reserve Banks," prevents the collection of checks in such way as to involve the payment of a charge to any bank on account of a remittance of the amount of the check. The Board then presents the inevitable conclusion that if the Federal Reserve Banks exercise their right to collect checks upon any bank, they must do so in a legal way. If no way is legal or permissible which involves or contemplates the payment of a charge to the payee bank to cover the so-called "service" of remittance by mail, then the only methods open for collection would be methods similar to the methods complained of in the plaintiffs' bill as about to be inaugurated.

Similarly analyzed, it would seem that the letter of the Governor of the defendant Reserve Bank, attached to the bill as exhibit "B," contains only a declaration of the intention of the defendant Reserve Bank to exercise its undoubted right to collect checks for the account of others in a legal way, although drawn on non-member banks. There is no ambiguity in the letter—no threat of an unlawful act. All bankers understand that there are but three general methods of paying checks, (1) through a clearing house, (2) through remittance by mail, and (3) over the counter in currency or in exchange. It is doubtless true that payment through a clearing house, or through the mails is the simplest and most advantageous method from the standpoint of banks, whether interested in collecting or remitting. It is doubtless true that any other method is, as pointed out in exhibit "B," "embarrassing, annoying and expensive," both to the collecting and remitting bank. It is respectfully submitted, however, that the simple statement that a failure to remit at par would force the adoption of methods of collection which might prove "embarrassing, annoying and expensive" to the payee bank, is in no wise equivalent to the making of an unlawful threat or the announcement of an unlawful purpose. It is doubtless true that the plaintiff banks desire to make a profit on the payment of checks drawn upon them, as they have made such profit in the past. It may be conceded for the purpose of this argument that there is nothing in the law, statute or common, which would prevent them from making such charge in any case where the person holding the check undertakes to avail himself of the "service," incident to the remitting of money through the mail, offered by the plaintiff banks or others in like situation.

Any person or corporation, whether a private individual, a State bank, a National bank, or a Federal Reserve Bank, might, if it were so minded, and there were

no statutory provisions to the contrary, send checks by mail to such banks for payment and thereby authorize the deduction from the face of the check of the customary amount for "exchange," but whether or not such service will be availed of must of necessity be optional with the holder of the check. Any corporation or bank, however chartered and whatever may be its particular powers, has the right, we respectfully submit, at its option, to carry directly, through an employee or specially designated agent, any check to the bank on which it is drawn and at the counter of the bank legally ask and receive currency or money of the United States to the full amount specified on the face of the check. It is, of course, an expensive method of collection from the standpoint of the holder. Such method of collection might, of course, prove mutually embarrassing. It is conceivable that it would present annoying features to both parties, but many things which are lawful are annoying, expensive and embarrassing, where legal rights are legally asserted and insisted upon.

We take it, therefore, that there can be no serious controversy about several fundamental propositions:

1. The Federal Reserve Banks have the right under the letter and spirit of the Federal Reserve Act, as amended, to which said banks must look for primary guidance, to undertake, if so directed or authorized by the Federal Reserve Board, to accept checks and drafts payable upon presentation, upon whatever bank drawn. That basic right is substantiated by the terms of the law itself.

2. If this clearing of checks be undertaken, it must be carried out in a manner permitted by law.

3. The provision of the Federal Reserve Act that no charges made by a bank for collection or payment of checks and drafts, and remission therefor, by exchange or otherwise, shall be made against the Federal Reserve Banks, clearly makes illegal the payment by defendant of such charges undertaken to be exacted by the payee bank for the "service" of remitting by mail.

4. If the Reserve Bank be prohibited from paying such charges, and if the payee bank refuses to forego the same, the Reserve Banks must collect in some other way, or else deny the business and commerce of the country, the per collection of checks to which it is, at the option of the Reserve Banks, entitled.

5. The only methods for collecting checks, other than through a clearing house or through the mails, involve a presentation over the counter of the bank upon which the check is drawn and a payment thereat.

6. There is nothing illegal, unusual or untoward involved in the collection of a check in currency at the counter of the bank on which such check is drawn.

Simply to state the above propositions is to demonstrate their legal soundness and we respectfully submit that under no theory of law or equity can the bill be maintained if it be considered with regard to the allegations of fact therein contained, divorced from the conclusions of the pleader.

It follows, from what has been said above, that if the non-member banks are entitled to the relief prayed, the result will be to balk the holder of any check, drawn upon a non-member or a non-clearing bank, in the exercise of his right to have the same cleared or paid through an agent of his own choice. If the holder of such a check

wishes to avail himself of the collection service of a bank which may be a member of the Federal Reserve System, and if the machinery through which the member bank operates to clear checks be the Federal Reserve System, and if the Federal Reserve Bank be prohibited by the Court's writ of injunction from collecting the check in the only way lawful to it under the Reserve Act, the practical effect is to allow the payee bank to so direct and control the channel of payment, even in cases where the check drawn on it is unrestricted, as to utilize the payment of such checks for its own aggrandizement, at the expense of the business and commercial interests of the country.

This bill should have been dismissed, because there is no basis therein laid for the relief in equity prayed. An injunction is asked against the commission of acts fundamentally and unquestionably legal and it is to the substance of a bill that the Court must look and not to the conclusions attempted to be predicated upon the averments of fact.

It is true that plaintiffs allege that the several acts charged as being in contemplation are undertaken for an ulterior purpose, viz: "To coerce petitioners and other banks in like condition to bow to the will of defendants in the matter of remitting at par to cover their daily letters, and ultimately to coerce petitioners and other banks in like condition to either join said Federal Reserve Bank, or maintain a clearing deposit account with said bank."

We submit, however, that the facts as alleged, do not justify the conclusion stated. If acts done be lawful, the courts cannot inquire into the motive, even conceding for the purpose of this argument that the motives of the defendants might be criticized. It would be an absurd

proposition, for instance, to say that a mortgagee with the mortgage debt in default, could be prevented from foreclosing the mortgage and the equity of redemption of the mortgagor in the mortgage security, because he instituted the proceedings to gratify a desire to see ill fortune visited on the mortgagor.

The letters of the Federal Reserve Board and of the defendant Reserve Bank announced clearly the intention to give to the persons entitled thereto the benefit of a universal collection and clearance of checks through the machinery of Federal Reserve Banks, pursuant to the intent of the Federal Reserve Act. That is the purpose set out in the letters on account of which the injunction is sought. That purpose is the real purpose alleged and shown by the averments of plaintiffs' bill itself. The specific acts charged as being in contemplation are acts in furtherance of that purpose. That purpose is a lawful purpose, and its execution, it is respectfully submitted, should not be restrained, nor should a bill seeking to restrain the execution of that purpose be maintainable in an equitable forum.

The clear import of exhibits "A" and "B" is to give every non-member bank the option of paying checks, in the hands of the Federal Reserve Bank for collection, either in par exchange or in currency. If the plaintiff banks voluntarily refuse to pay checks in par exchange, they ought not, we submit, in equity and good conscience, to be allowed to undertake to restrain the collection in the only other known medium of payment lawful for acceptance by the Reserve Bank, viz: in currency without deduction for remittance charges made by the payee bank. The Federal Reserve Bank must put up this option of payment in par exchange or in currency to each individual bank not voluntarily remitting at par, or else refuse

to handle checks drawn on such banks, and we affirm that the bank on which a check is drawn is not the authority to dictate or control the discretion of the Reserve Bank in the premises.

It is also true that the bill alleges that the defendants "threaten and intend to use the great resources of said Federal Reserve Bank to compel petitioners and other banks in like condition to either join said Federal Reserve Bank or else have their business so interfered with and their revenues so depleted by the embarrassing, annoying and expensive methods in preparation for exploit upon them as to drive them out of business altogether." This allegation, however, is likewise insufficient to add any actionable element to the case attempted to be made in the bill, for the reason that the bill itself shows no such intent and no such threat. On the contrary, the bill does show that the defendants intend to collect checks in a lawful way and "threaten" simply to exercise a common, ordinary, legal right. The vague charges of compulsion and coercion designed to force the plaintiffs to join the Federal Reserve System are conclusions pure and simple, and cannot be maintained or supported by any allegation of fact contained in the bill. A threat to do a lawful thing which might deplete to some extent the profits of a bank adds no element of actionable wrong. It is no part of the duty of any financial institution to so conduct its affairs as to waive or forego legal rights in order that another institution may thereby realize the maximum of profit from the conduct of its business. There is no injury in contemplation of law in those cases where the party who is alleged to have inflicted damage, has inflicted such damage as an incident in and to the exercise on his part of a complete legal right.

The above stated propositions involve merely elementary principles of law, which we believe the Court will recognize and apply.

The amendment to the bill (Record pp. 63-74) fails in every respect to bolster up the essential weakness of the case as made in the original pleadings. The attempted interpretation and construction of sections 13 and 16 of the Federal Reserve Act, therein contained, is obviously no part of the "cause of action" attempted to be alleged. The Act speaks for itself and the Court will construe it. The facts alleged with respect to isolated instances of checks collected through the defendant Reserve Bank upon which "exchange" charges are said to have been made against said bank are wholly destitute of legal effect in this case. Recitals of "financial violence" as committed by other Reserve Banks manifestly throw no light on the right of these defendants to collect checks over the respective counters of the plaintiff banks. Certainly the fact that one of the directors of the Houston branch of the Federal Reserve Bank of Dallas has seen fit to resign his office because he personally did not approve of par clearance has no relevancy or pertinence to the case. Even the remarkable allegation that the twelve Federal Reserve Banks of the United States have combined and confederated together to deprive country banks throughout the United States "of the valuable property right to charge for their services in transmitting funds," wholly fails to introduce any actionable element. Each Federal Reserve Bank operates in a territory designated and circumscribed by statute. Hence, the legal impossibility of any contact between plaintiffs and any Reserve Bank other than the appellee bank would preclude the possibility of any confederation in this regard, even if the object of the combination were properly alleged to be the destruction of a genuine property right instead of the anomalous "property

right" to make a profit out of a "service," tendered perhaps but unavailed of in fact. Such an erroneous designation of "property" would of itself render this charge of a "combined and concerted movement" of no legal force and effect. It is a novel conception of "property" to regard it as embracing within its meaning the "right" to make a profit upon a service which is not rendered. It is equally novel to conceive of an unlawful deprivation of property rights as being accomplished simply by abstaining from the invoking of a service for the rendition of which, if rendered, the party "deprived" would be entitled to a profitable compensation.

The anomaly of this conception of property would appear to be so patent as to obviate the necessity of citing authority. We desire, however, to call attention to one case as illustrative of our argument in this immediate connection, *Tanenbaum vs. N. Y. Fire Ins. Exchange*, 68 N. Y. Sup. 342; 33 Misc. 134 (1900) Supreme Court of N. Y. Co.

It appears from the statement of facts in that case, as reported, that the defendant Exchange was an association of fire insurance companies and underwriters who had agreed not to pay any commission to insurance brokers who had not been approved and licensed by the Exchange. To procure such license the broker was required to conform to certain rules and to agree not to give any part of a commission to his customer nor to accept any commission in excess of the rate of commission as fixed by the Exchange. Plaintiff was a broker who was unwilling to conduct his business in accordance with the rules of the Exchange. He alleged in his bill that there was an immemorial custom among fire insurance underwriters to pay commissions to any broker bringing insurance. He sought to enjoin the carrying out of the agreement be-

tween the members of defendant Exchange on the ground that the agreement was illegal as in restraint of trade and as evidencing a conspiracy directed against his lawful occupation.

In discussing the point of restraint of trade, Bischoff, J., said on page 344:

"The allegation that commissions are paid to brokers in accordance with immemorial custom does not import a vested right in every broker to demand commissions and to enjoin a threatened refusal. If the company should accept the business brought, and should recognize the broker in the transaction, custom could, of course, mould the rights of the parties, as in the case of all contracts where a custom intervenes, but certainly no custom can make an agreement for parties where one declines to contract. *Gulf C. & S. F. R. Co. vs. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed 420."

As to conspiracy, the Court said, on page 344:

"Nor do I think that the facts bring the case within the principles under which the acts of persons unlawfully combining together to the intended detriment of another's business may be restrained. The plaintiff is affected by the agreement in question because his method of business is such that he may lose in the performance of outstanding contracts should he conform to the requirements of the Exchange; but this is merely the result of a situation in which the defendants, by regulating the qualifications of persons to whom they will pay commissions, have exercised the right to select the persons with whom they will do business—an attitude which is perfectly lawful, when assumed by one or by many. (*Davis vs. Hoisting Engineers*, 28 App. Div. 401, 51 N. Y. Supp. 180),

and none the less lawful in the case of insurance companies (*Hunt vs. Simonds*, 19 Mo. 583; *Queen Ins. Co. vs. State* (Tex. Sup.), 24 S. W. 397, 22 L. R. A. 483). The combination, such as it is, has not been shown, upon the facts presented, to fall within any of the legal definitions of a conspiracy, and many of the essential characteristics are lacking. See *Macauley vs. Tierney* (R. I.), 33 Atl. 1, 37 L. R. A. 455."

Another question, attempted to be raised in plaintiffs' bill, centers around the vague and indefinite allegation of conspiracy contained in paragraph 33, to the effect that the individual defendants have conspired and confederated together with the avowed purpose of using the financial power of the Federal Reserve Bank to compel the banking institutions of this State to take out membership in said Federal Reserve Bank. That allegation, properly considered, has no relevancy to the case, attempted to be made, for the reason that the case which plaintiffs undertake to make is one turning solely upon an attempt to collect checks by personal presentation instead of presentation through the mails. There is no connection between the "threatened acts" charged and an attempt to force membership in the Federal Reserve Bank. There is no logical sequence between the two.

The Court will construe the bill as a whole, and so construed, we respectfully affirm, no connection can be drawn nor can any logical sequence be traced between the alleged intended acts of the defendants and the purpose asserted to underlie these threatened acts. In other words, the bill does not make a case of conspiracy to compel, force or coerce State banks into joining the Federal Reserve System. The gravamen of the complaint is a threatened effort to collect checks by methods other than by presentation through the mails. There is no more of a con-

spiracy to force State banks to join the Reserve System actually or properly alleged in the bill than would be true if the bill were filed asserting the proposition baldly, with no facts averred in support thereof.

There can be no doubt about the proposition that the plaintiffs must *allege* that there is a conspiracy to do an illegal thing, or a legal thing by illegal methods, if they wish to rely on such conspiracy in praying for relief. (12 *Corpus Juris*, 585, 630). And in the bill of plaintiffs as filed the conspiracy baldly asserted, is not a conspiracy to do or perform the specific acts of which plaintiffs complain.

Since the allegation is in the bill, however, we will discuss briefly a few of the cases which involve the question of civil "conspiracy." These cases will be found to be applicable to a consideration of the elements that must be present before any case of civil conspiracy is made out. Therefore, they apply not only in a consideration of the alleged conspiracy on the part of the defendants "to compel the banking institutions of this State to take out membership in said Federal Reserve Bank," but also to the alleged conspiracy, heretofore discussed, on the part of "all the Federal Reserve Banks * * * to injure and damage plaintiffs and other Country Banks throughout the United States by depriving them of the valuable property right to charge for their services in transmitting funds," etc.

The essentials of a conspiracy, whether viewed as a matter involving criminal liability, or in relation to its actionable nature in a civil proceeding, are commonly summed up in this general language:

"It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means," 12 *Corpus Juris*, page 540.

A number of cases are cited in support of the text.

"In other words, to constitute a conspiracy, the purpose to be effected by it must be unlawful in its nature or in the means to be employed for its accomplishment." *Id.* 541-2, citing specifically, *Atchinson, etc., R. Co. vs. Brown*, 80 Kan. 312, 23 L. R. A. (N. S.) 247, 248.

A number of the authorities cited in *Corpus Juris* have been examined, and they would seem to uphold in every particular the statements of law as contained in the text. One of the cases cited in support of the rule above given is *Pettibone vs. United States*, 148 U. S. 197, 203, wherein the Court used this language: "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

There are a large number of cases in the books which consider and adjudicate the essentials of a civil conspiracy, and the elements involved therein. The respective definitions, as given in those case which undertake a definition of the offense, are in language the import whereof is almost identical with that above quoted. Most of the cases involved strikes, lockouts, boycotts and combinations of labor or capital. Very little can be gained by an exhaustive review of all the authorities. They may be said in general to be fully in accord on the general principles involved. Naturally each case presents a different question when it be regarded in the light of well settled legal principles, with reference to its particular facts. It appears that if the facts as charged be insufficient in law to constitute a conspiracy within the meaning of the law, the case must be dismissed on demurrer or upon

motion which is tantamount thereto. No case, so far as can be determined, has been decided where the facts involved show any similarity to those presented by the case at bar. The case being considered is essentially one of first impression in so far as its particular facts are concerned. There are, however, a number of cases which adjudicate the principles that are contended for by the appellees, a few of which might appropriately be cited here as illustrative of the appellees' position.

Bearing in mind the fact that the "conspiracy" undertaken to be alleged in this case is claimed to be evidenced solely by certain threats made, it is important to know just what threats in law may properly be regarded as actionable in the sense that they will support the grant of an injunction. In the legal sense of the term, an actionable "threat" does not embrace every announcement of an intention to do an act which will result in an injury to another; it embraces only the announcement of an intention to do an unlawful act. *National Protective Association vs. Cumming*, 170 N. Y. 315, 329, 58 L. R. A. 135.

Coercion, in the legal sense of the term, does not embrace every constraint placed upon the free will of another, but only such constraint as results from the announcement of an intention to do, or from the doing of, an unlawful act to the prejudice of the person constrained. *Parkison Co. vs. Building Trades Council*, 154 California, 581.

"Calling a transaction a conspiracy does not make it such, nor do mere epithets in a pleading constitute evidence." *Root vs. Rose*, 6 North Dakota, 572, 72 N. W. 1022.

"It is also elementary and must be evident to all that there can be no such thing as a conspiracy to do

a lawful act in a lawful manner." *Youman vs. Hanna*, 35 N. D. 479, 160 N. W. 705, Ann. Cases 1917 (E) 263, 275.

In the case last cited, the conspiracy charged was to drive the plaintiff out of the banking business and to compel him to sell his stock and interest in the Savings Deposit Bank of Minot, and to mortgage his residence property to certain of the defendants. A series of persecutions and oppressive conduct on the part of the State banking officials was alleged to sustain a conspiracy of the character averred. The Court held that the acts of the defendants were lawful, and were done in a lawful way, and that the rule was as above announced.

"In contemplation of law there can be no malice of conspiracy where the thing to be done is lawful and the means employed in doing the thing are also lawful." *Barton vs. Rogers, et al.*, 21 Idaho, 609, 40 L. R. A. (N. S.) 681.

The case last cited also contains the following statement of law:

"It is quite generally held that what a person may lawfully do may be done with or without malice. *Carpenter vs. Grimes Pass Placer Min. Co.*, 19 Idaho, 384, 114 Pac. 42; *McHenry vs. Sneer*, 56 Iowa 649, 10 N. W. 234; *Porter vs. Mack*, 50 W. Va. 581, 40 S. E. 459; note 9, p. 727 of 62 L. R. A.; *Macauley Bros. vs. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, and notes, 33 Atl. 1, 37 L. R. A. 455."

"In other words, there can be no legal malice in contemplation of law where the thing done is lawful and the means employed are lawful." *Barton vs. Rogers, supra*.

In the case of *Barton vs. Rogers*, above cited, it appears that Barton was a school teacher and was engaged in making a political race for office; that the defendants, constituting the School Board, through methods alleged to be oppressive and as the result of a conspiracy, forced him out of the race. The Court held that "the courts must judge the intent a man has in doing the act, by the means he employs and the thing to be accomplished, and, if they all be lawful, courts cannot impute malice or unlawful motives to the actor."

"It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law, and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance." *Macaulay, et al., vs. Tierney, et al.*, 37 L. R. A. 455, 459, 19 R. I. 255.

The particular matter considered in this last cited case was an agreement among the members of an association of plumbers not to deal with wholesale dealers who might sell to any one who was not a member of the association. It was held that the sending of notices to that end did not constitute unlawful conspiracy, since the object of the combination and the means adopted for its accomplishment were lawful.

"An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may incidentally injure third persons." *National Fireproofing Co. vs.*

Mason Builders' Association, 169 Fed. 259 (C. C. A. 2d Circuit.) "The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*. The damage is present, but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit." *National Fireproofing Co. vs. Builders' Association*, *supra*, 265.

In this last cited case, there is an elaborate review of the authorities, some of which are cited above.

Where the motives of the defendants are only to obtain their own economic benefit without any malicious intent to cause damage, and where resulting injury is incidental, no violence being employed, there is no conspiracy. *Allis-Chalmers Co. vs. Iron Moulders Union*, 150 Fed. 155, 179, with authorities cited.

"To constitute a conspiracy, the purpose to be effected by it must be unlawful, either in respect of its nature, or in respect of the means to be employed for its accomplishment." *Atchison, Topeka, etc., Ry. Co. vs. Brown*, (Kansas), 102 Pac. 459, 23 L. R. A. (N. S.) 247, 248, citing *People vs. Willis*, 24 Misc. 537, 54 N. Y. Supp. 129, 133; *People vs. Olson*, 39 N. Y. S. R. 295, 15 N. Y. Supp. 778, 779; *Payne vs. Western & A. R. Co.*, 13 Lea. 507, 521, 49 Am. Rep. 666; 2 Words & Phrases, p. 1460.

The Federal reports are full of cases to the same effect. No decisions contrary thereto are found in the reports of this Court. The above cited cases are selected al-

most at random. To list all of the cases which involve these general propositions would carry this brief to the proportions of a digest.

There is no doubt as to the law. It is undoubtedly true that if persons unlawfully conspire to injure another in his business, the actuating motive being the injury of such person, which is an unlawful motive, such facts make a conspiracy, the execution and furtherance of which will be enjoined by a court of equity upon showing; but it is respectfully submitted that an unlawful conspiracy is not evidenced, even for the purpose of pleading, by the mere declaration that one exists. The plaintiffs must show facts constituting the unlawful nature of the combination. Merely denominating a series of acts an unlawful conspiracy is not enough. This principle is laid down in the cases cited, a number of which were decided on issues of law made by demurrer.

Turning again to the bill of plaintiffs, we find the allegations thereof, which are made the basis for the prayers, to be that the defendants intend to collect checks at the counters of plaintiff banks, where the checks are drawn on such banks and the said plaintiffs refuse to remit by mail at par. The Court cannot connect with those threatened acts any result except that which would logically flow therefrom, and cannot, as a matter of law, determine that those acts, or threatened acts, are designed to bring about a result wholly fanciful. The acts are lawful, the only object therefor which may be legitimately inferred from this bill is lawful, the means employed are lawful. The mere isolated disconnected charge that the underlying purpose is to force the plaintiffs to join the Federal Reserve Bank is a *non sequitur*, unrelated to any specific averment in the pleadings. The plaintiffs might have alleged, with equal reason and logic, that the underlying

purpose behind said acts was to force the respective presidents of the various plaintiff banks to smoke a particular brand of cigars.

To denominate a set of lawful acts, in contemplation, an unlawful conspiracy, does not make such a conspiracy, even for the purposes of pleading; and although this argument be one on motion to dismiss for want of equity with all allegations, properly made, taken as true, an unlawful conspiracy should not be inferred in this case because plaintiffs assert that one exists.

Nor is there a conspiracy in legal contemplation, properly charged by the unsupported allegation that the twelve Federal Reserve Banks have conspired and combined to deprive the country banks of the United States of a "property right."

We repeat, in summing up, that each Federal Reserve Bank operates in a circumscribed and limited territory fixed by law. No Federal Reserve Bank, except the Federal Reserve Bank of Atlanta, can touch or affect, directly or indirectly, any bank in this litigation. A conspiracy, therefore, of the sort attempted to be charged in the bill, is legally an impossibility. Furthermore, an alleged conspiracy to deprive a person of a "property right" which is in law no property right at all, cannot in law be regarded as a conspiracy of any kind. It is utterly impossible in law and in fact to deprive a person of a "right" which does not exist. Unless the plaintiffs have the absolute right to make a profit upon a service not availed of, or to force this service upon those who do not see fit to use it, there can be no deprivation of any right involved. Hence the absurdity of the charge of a conspiracy to bring about a legal impossibility.

However this bill may be considered, from whatever angle or aspect it may be studied, the fact is apparent that it contains no averments upon which could be introduced any proof which would tend to show anything except that the appellees were proceeding, when this bill was filed against them, to do a lawful thing in a lawful way, without stepping in any respect beyond the bounds of law. There is no proper charge of any invasion of a legal right, nor of any attempt or effort maliciously to injure the respective businesses of appellants, and no allegation that any invasion of a legal right is threatened.

We respectfully submit that the doctrine of *Sic utere tuo ut alienum non loedas* has no application to this case. To carry out the policy of Congress, as embodied in the Federal Reserve Act, the actuating motive in so doing being to observe the letter and spirit of said Act, and not to inflict injury upon appellants, does not constitute a use of one's own property in such manner as to injure the rights or property of another. If the Federal Reserve Bank of Atlanta is to be required by the decree of a Court of equity to stop the collection of checks drawn on appellant banks in the way which appellant banks themselves have made the only legal way possible to the Reserve Bank, then the appellants have been made and constituted the arbitrary dictators of the extent to which the Federal Reserve Board and the appellee bank may inaugurate and carry out policies not only permitted, but encouraged by the letter and spirit of the Federal Reserve Act. And yet, the appellants say that because this exercise of a legal right on the part of the appellee bank, in full line with the policy of the Federal Reserve Act, would incidentally cause to them a monetary loss, in that they would thereby be prevented from rendering a "service" for which a charge could be made if rendered, this case falls within the category of cases where the Courts

have enjoined a malicious assertion of a claimed right as being destructive of the conflicting rights of others. There is, for example, no analogy between the case at bar and a case involving the "use" of a public road by one entitled to use the same to the exclusion or damage of others similarly entitled thereto.

The doctrine of "unfair competition" has no application to this case. Each of the appellants may, at its option, remit by check or in exchange at par to the Federal Reserve Bank of Atlanta, or it may make payment to the bank or its agents in cash. Although appellants' bill contains the bald unsupported averment that the Federal Reserve Bank of Atlanta is insisting upon its right to collect checks in cash for ulterior purposes, such allegation must, in view of the Federal Reserve Act itself, be wholly destitute of legal effect. To assume that the appellee bank and its officers, acting under the direction of the Federal Reserve Board, are carrying out the policy of Congress with respect to the collection and clearance of checks, as embodied in the Federal Reserve Act, for the purpose of crushing the appellant banks, or of forcing them into the Federal Reserve System, is to assume that Congress itself originated the "conspiracy" complained of, and was itself the original "conspirator." Such allegation so made by the appellants, does supreme violence to common sense, and cannot be taken as a legal averment of "unfair competition" upon which to base a prayer for injunction.

2.

Intent and Meaning of the Federal Reserve Act With Respect to the Collection of Checks and the Payment of Charges Therefor.

Counsel for appellants undertake to strengthen their contention that the threatened acts complained of in their bill are *ultra vires* the powers of the Federal Reserve Bank by citing two certain opinions rendered, respectively, in March and April, 1918, by the then Attorney-General of the United States, Mr. T. W. Gregory. These two opinions are cited in an attempt to bolster up the contention of the appellants that the language in section 13 of the Federal Reserve Act, "no such charges shall be made against the Federal Reserve Banks," implies a prohibition on the bank to incur any expense in and about the collection of checks, whether for "exchange," for messenger hire or otherwise. They say, therefore, that the payment by the Federal Reserve Bank of compensation to a messenger employed to make collection of any check at the office of the payee bank would be a "charge for the collection of such check" and, hence, *ultra vires* because within the prohibition of the Act.

A complete answer to such contention was made by the Circuit Court of Appeals in its opinion (record p. 125) as follows:

"It follows that the acts of the Federal Reserve Bank complained of are within its legal powers. Conceding that they were *ultra vires* solely because entailing an unauthorized disposition of the banks' assets, the appellants and intervenors, who were neither stockholders nor creditors of the Reserve Bank, would have no standing to complain of such a disposition, because of a collateral injury to them. The right to make complaint on that ground would be confined to the United States or to individuals who were injured by the depletion of the banks' assets. If the purpose of the prohibition was altogether to save expense to the Federal Reserve Banks and if the statute evinced no policy to prevent the Reserve

Banks from handling checks of non-members and non-depositing banks, if it incurred no expense; the mere incidental injury that appellants suffered from the handling of such checks, would give it no right to complain of an expenditure from which it could suffer no injury."

In other words, the Circuit Court of Appeals held that the acts of appellee bank complained of were entirely within its powers, but that even had the same been *ultra vires*, the appellants could not at law or in equity take exceptions thereto under the facts as alleged. In this statement of the law as to the right of a person, only incidentally affected, to complain of an *ultra vires* act the Court of Appeals was correct. (See, for example, *National Bank vs. Matthews*, 98 U. S. 621, and similar cases decided by this Court.)

But regardless of whether or not the appellants would have the right to enjoin the commission of an *ultra vires* act of appellee bank upon the ground that the act entailed an unauthorized expenditure of its funds, the fact is that unquestionably the Federal Reserve Bank of Atlanta has, under the law, the charter right and corporate capacity to pay the expenses incident to the employment of a messenger or agent to make collection of checks upon personal presentation. There is no merit in the contention that because a Reserve bank is prohibited by law from paying "exchange" charges exacted by banks to cover the "service" of remitting for checks and drafts, therefore, the prohibition extends to the incurring of any expense in and about such collections.

Nor do the opinions of the Attorney General referred to by appellants support their contention in this regard. These opinions must be considered and regarded in their

relationship to the questions propounded for decision. In the opinion of March 21, 1918, Mr. Gregory construed only the question of whether or not the limitations contained in section 13 of the Federal Reserve Act, relating to charges for the collection and payment of checks, could be held to apply to State banks which are neither members of the Federal Reserve System nor depositors in the Federal Reserve Banks. His conclusion was that these limitations do not apply to State banks not connected with the Federal Reserve System as members or depositors. *Arguendo*, he reasons that the broad language "no such charges shall be made against the Federal Reserve Banks" (that is, charges made by banks for the collection or payment of checks or drafts and remission therefor by exchange or otherwise) is in effect a prohibition against the payment of such charges by the Federal Reserve Banks. From this he concludes that checks on banks making such charges cannot be handled by the Federal Reserve Banks in such a way as to incur a liability to pay the same. In no part of his opinion does he consider or discuss the legality of the employment of an agent to collect checks upon a personal presentation, with the incurring of the expense consequent upon such employment.

In the opinion of April 30th the sole matter considered was the question of whether or not there was any distinction to be drawn, in so far as charges for "exchange" were concerned, between checks owned by the Federal Reserve Banks and checks deposited to be cleared or collected for the account of a member or depositor. The opinion of the Attorney-General was to the effect that the checks could not be classified on the basis suggested, because "the charges which the Federal Reserve Banks are prohibited from paying by the final clause 'no such charges shall be made against the Federal Reserve Banks'

obviously include the charges for collection or payment of checks and drafts and remission therefor by exchange or otherwise, mentioned in the preceding clause." (The preceding clause referred to affects only charges made by banks for collection or payment of checks and drafts and remission therefor by exchange or otherwise.)

It appears then beyond question that the Attorney-General did not in the said opinions decide, nor did he undertake to decide, any matter touching the right of Federal Reserve Banks to make collections directly at the counter of a payee bank through a compensated agent employed for the purpose. The only question decided by him was that the Federal Reserve Banks could not legally pay "exchange" charges to banks, and that this amounted to a prohibition against handling checks, through the ordinary channels of mail, in cases where remittances would not be made by the payee banks at par.

Counsel undertake to say that if the Act be construed as prohibiting in terms the payment of a small charge to a bank, it must be against the spirit of the Act to pay a larger charge to a messenger employed for the specific purpose of presenting the checks direct to the bank. This argument is obviously unsound. Carried to its logical extent, it would necessarily follow that the Reserve Banks could legally incur no expense of any kind in and about the collection of a check. It would preclude as illegal the employing of clerks and the maintaining of a clearing department, because the maintenance of a clearing department necessarily involves expenditures. The prohibition in the Act is simply against the payment to a bank of an amount to compensate for the so-called "service" of remission by mail, and there is no way in which the statute can be so stretched or distorted as to make it susceptible of the meaning undertaken to be placed thereon by appellants.

It does not follow that because the Federal Reserve Bank is inhibited in terms from paying a charge which a *payee bank* may make "for the payment of checks and remission therefor by exchange or otherwise," it should be impliedly inhibited from the incurring of *any* expense in connection with such collection or payment and remission therefor. At any rate, the statute speaks for itself, and the Court will construe the statute as it was enacted, and not with respect to provisions which appellants consider should be read into the Act by implication.

Such construction, attempted to be put upon the statute, by the appellants is unsound, furthermore, because it is based upon the assumption that the proviso "No such charges shall be made against the Federal Reserve Banks" was placed in the law to limit the expenditures of the bank, whereas, we contend that the purpose of such provision was the protection of par clearance through the Federal Reserve System.

It is respectfully urged that at the time of the passage of the Federal Reserve Act three important objectives were in the mind of Congress. (a) The mobilization of the reserves of the United States, (b) providing machinery to make more elastic the currency system, and (c) the effective clearing of checks at par throughout the United States. These three great objects which Congress had in view may easily be gathered from a study of the Act. If the Act be regarded from the viewpoint of the old law, the mischief and the remedy, the purpose of Congress in providing for clearance of checks in such a way as to prevent the making of a collection charge as against the Federal Reserve Bank, becomes apparent.

Checks were formerly collected in a more or less haphazard way through clearing arrangements entered into

between different banks with the idea of gaining the largest possible return through charges made for payment and remission of such checks. When the Federal Reserve Act was passed it contained in its original form a provision for the clearing of checks to a limited extent through the Federal Reserve System. Such original provisions, however, were not as broad as those embodied in the present law. We have heretofore (page 53 of this brief) quoted in full the relevant portion of section 13 of the Act as it now stands. The relevant portion of section 13 as originally enacted (Ch. 6, 38 Stat. L. 251) is as follows:

"Sec. 13. Any Federal Reserve Bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal Reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal Reserve Banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal Reserve Banks, payable upon presentation."

It will be noted from an examination of the original section that any Federal Reserve Bank was permitted thereby to receive from any of its member banks and from the United States, etc., checks and drafts upon *solvent member banks*, payable upon presentation. The original provisions of the section, therefore, limited deposits in Reserve Banks made by member banks, in so far as checks and drafts were concerned, to those drawn on *solvent member banks*. Even in that portion of the section providing for deposits by other Federal Reserve Banks for exchange purposes, such deposits were limited to the deposit of current funds in lawful money, national-

bank notes, or checks and drafts upon *solvent member or other Federal Reserve Banks*.

Section 16, providing for the establishment of clearing houses in the Federal Reserve Banks, when required, in the discretion of the Federal Reserve Board, has not been amended. As enacted, therefore, it was in the language heretofore quoted. (Page 54 of this brief.)

We think, therefore, that the legislative history of the Federal Reserve Act is particularly illuminating in its disclosure of a Congressional intent to provide for and protect the clearance of checks through the Federal Reserve Banks. The Federal Reserve Act was approved December 23, 1913. The Federal Reserve Banks began to do business in November, 1914. The provisions of section 13, as originally enacted and above set forth, indicated a Congressional intent to safeguard and provide for the clearing of checks, although not for the clearing of all checks on whatever bank drawn.

Apparently, however, the limiting of deposits in Federal Reserve Banks to checks and drafts drawn on solvent member banks did not adequately provide, in the opinion of Congress, for a sufficiently comprehensive system of clearing through the various Reserve Banks. Therefore, section 13 has, since 1913, been several times amended. On September 7, 1916, Congress amended the said section by an Act (39 Stat. 752, ch. 461,) which expressly permitted (although it did not require) Federal Reserve Banks to receive for deposit *all checks and drafts payable on presentation*. On June 21, 1917, Congress again amended the terms of section 13 by further defining the collection powers of a Federal Reserve Bank (40 Stat. 232, ch. 32). The obvious purpose of that amendment was two-fold: It was, first, to permit non-member banks to become clearing members of the Federal Reserve Sys-

tem. That is, to permit such institutions to avail themselves of the privileges of the check collection system upon the maintenance with the Reserve Bank of a deposit sufficient to offset items in transit, without becoming regular members. It was, second, to permit both member and non-member banks:—

"To make reasonable charges to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise."

But it was expressly provided that:

"No such charges shall be made against the Federal Reserve Banks."

The amendment of June 21, 1917, is commonly referred to as the Hardwick amendment, and represents the last change in the law, in so far as it relates to the collection of checks.

The original enactment and the above mentioned amendments, constitute the portion of said section relevant to this discussion as the same now exists.

We have then for consideration, a law progressively amended so as to permit in terms, and not alone by implication, the widest scope of check clearing through the Federal Reserve Banks. The Attorney-General of the United States, in his opinions referred to by Counsel for appellants, and quoted in their brief as filed in the Circuit Court of Appeals, recites the same legislative history. The Attorney-General comments upon the various amendments to the law as follows: "It thus seems clear that

the proviso was intended by Congress as designed to protect the clearing functions of the Federal Reserve Banks."

We have stated in some detail the legislative history of sections 13 and 16 of the Federal Reserve Act, because we believe that such explanation clarifies our contention that the underlying purpose of this legislation, with successive amendments designed to facilitate clearing, was to protect the clearing house established by the Federal Reserve Board, and not to prohibit Federal Reserve Banks from incurring such expenses in connection with the collection of checks as are not expressly prohibited in and by the specific terms of the statute. It follows, therefore, that there is nothing illogical in the position of the Federal Reserve Board and of the defendants in this case, viz: that they cannot, under the law, pay charges to a payee bank for remittances on account of checks and drafts drawn upon the bank undertaking to make the charge, but may legally pay the charges of an agent employed for personal presentation. To pay such "exchange" charges to a bank would be destructive of universal *par* clearance—to compensate an agent who may collect checks by personal presentation is in aid of the extension of these clearing functions, and not destructive thereof.

The rights of the Federal Reserve Banks in the premises and the duties of Federal Reserve Banks under the law, have been succinctly summed up by Governor Harding of the Federal Reserve Board in the language hereinafter quoted, which we adopt as a part of our argument in this case. (See Senate document 184, embodying report of the Governor of the Federal Reserve Board, made in response to Senate resolution dated January 19, 1920, referred to Senate Committee on Banking and Currency, and ordered to be printed):

"Believing that the purpose of the law itself and the needs and interest of the country as a whole would be better accommodated by the ability of the Federal Reserve Banks to collect for their member and clearing member banks all checks presented to them for that purpose, the board has consistently approved the efforts of the Reserve Banks to collect all checks upon whomsoever drawn, member banks, non-member banks, or private banks, whether or not they agree in advance to remit at par.

"But there are only three ways in which the holder of a check, whether an individual or a corporation, may lawfully and properly undertake its collection; (1) He may present it in person over the counter of the drawee bank for payment; (2) he may forward it to an agent more conveniently located geographically for the purpose of presentation through the agent to the drawee bank over its counter for payment; (3) he may forward it direct to the drawee bank for payment and remission therefor in cash or exchange.

"The Federal Reserve Banks in the operation of their check-collection systems have followed the third course in the case of checks drawn on member and non-member banks which may have agreed to remit at par either in cash or satisfactory exchange, and whether cash or exchange is remitted the Federal Reserve Banks have generally provided postage or necessary costs of transportation covering the shipment to the Reserve Bank. Because of the fact, however, that the so-called Hardwick amendment to Section 13 not only prohibits a bank charging, but also prohibits the Federal Reserve Bank paying, a charge for the 'payment or collection of checks and drafts and remission therefor by exchange or otherwise,' Federal Re-

serve Banks have been impelled to forego the collection of checks in this manner in any case where the drawee bank does not care to remit at par * * * The only other available means of making the collection is to employ some suitable agent for that purpose. Not to adopt that means would necessitate a flat refusal by the Reserve Bank to handle the item for collection in any manner and the Board and the Reserve Banks feel that that would now be an evasion of one of the ultimate purposes for which the law was enacted; that is, the establishment of a universal country-wide par-collection system and the resultant elimination of the burdensome delays and expenses incident to the old indirect routing system."

The above embodies the interpretation of the law as placed thereon by the highest officer of the Federal Reserve Board.

The contemporaneous construction of a statute by those charged with its execution is entitled to great weight, and should not be disregarded or overturned except for cogent reason, and unless it be clear that such construction is erroneous. Where the construction placed on a statute by those charged with its execution has long prevailed, the rule is always stronger." *U. S. vs. Johnston*, 124 U. S. 236; *Edwards vs. Darby*, 12 Wheat. 206; *U. S. vs. Moore*, 95 U. S. 760; *Hahn vs. U. S.*, 107 U. S. 402; *U. S. vs. Philbrick*, 120 U. S. 52, 59.

"The construction placed upon a statute by the officer whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the Executive Department of the Government, or has been observed and acted upon for many years, and such

construction should not be disregarded or overturned, unless it is clearly erroneous." 36 Cyc. 1140, *et seq.*, supported by the citation in the notes of a number of cases.

It is not contended, of course, that the construction placed on the law by the officer in charge of its administration is conclusive upon this Court, but it is respectfully submitted that the same should receive due consideration. Nor do we intend to imply in citing the authority next above quoted that this statute is ambiguous or of doubtful meaning. We simply present to the Court the interpretation of the law as placed thereon by those in charge of its administration for such consideration and regard as the Court may see fit to give it. We contend that the statute is susceptible of no construction other than that placed on it by the Federal Reserve Board, particularly when its legislative history is taken into account. This view is also amply borne out by the quotation made from the opinion of the Attorney General of the United States, in which he states that the object which Congress had in mind throughout the law was to protect the clearing house functions of the Federal Reserve Banks.

CONCLUSION.

The foregoing argument, we believe, considers and discusses all legal principles which are controlling in this case. As stated in the introduction, we have not attempted to relate every argument made to one or more of appellants' specific assignments of error. To answer specifically every assignment of error would unduly extend the argument. Authorities have been cited which, we think, sustain the legal and equitable principles stated herein.

We submit, in conclusion, that there was no error in the District Court in upholding jurisdiction of the cause, upon a consideration of the motion to remand, and that the said Court did not err in dismissing the bill as being wholly wanting in equity. Certainly the Court would not have been justified, upon the allegations made, in enjoining the Federal Reserve Bank of Atlanta from making any collection of checks drawn on any of the appellants, except through the channels arbitrarily pointed out by the appellants.

The Circuit Court of Appeals having affirmed the District Court upon both decrees, we respectfully ask of this Honorable Court its judgment affirming the Circuit Court of Appeals.

All of which is respectfully submitted.

HOLLINS N. RANDOLPH,

ROBERT S. PARKER,

Solicitors and of Counsel for Appellees.

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(28,036)

In the Supreme Court of the United States

October Term, 1920

No. 679

AMERICAN BANK & TRUST COMPANY, *ET AL.*,
Appellants,

v.

FEDERAL RESERVE BANK OF ATLANTA, *ET AL.*,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ADDENDA TO BRIEF FOR APPELLEES.

In the original bill, as filed by appellants, to-wit: in paragraph 43 thereof, (record page 20) appears an allegation which, impliedly at least, raises a question as to the power of Congress to confer upon a Federal Reserve Bank the right to do anything which would interfere with the exercise, on the part of a State Bank, of any power permitted to such State Bank by its charter. In other

words, by that particular allegation, the appellants apparently undertake to raise a doubt as to the power of Congress to invest the Federal Reserve Bank of Atlanta with the corporate capacity to collect checks in such a way as to interfere with the ordinary customs of collection obtaining among non-member banks.

The particular issue, attempted to be raised by this allegation, is not argued in the brief for appellants, and is apparently abandoned. In view of the fact, however, that this Court might *sua sponte* examine into the validity of those provisions of the Federal Reserve Act, the construction of which is drawn into issue by the appellants' original bill, we cite to the Court the case of *First National Bank of Bay City v. Fellows, Attorney General*, *et rel Union Trust Company*, 244 U. S. 416. This case contains a recent discussion of the extent to which Congress may invest its creatures with appropriate corporate powers.

It is not believed that the case last cited is relevant to the issues at bar, but the same might be helpful in a consideration of questions which might possibly arise in the mind of the Court.

JURISDICTION.

That the District Court had jurisdiction of this cause upon removal is conclusively settled by this Court in the case of *Smith v. Kansas City Title & Trust Company*, decided February 28, 1921, and being numbered on the Dockets of this Court as 199, October Term, 1920. The

case last cited is not referred to in the main brief filed by appellees for the reason that complete copies of the same were not available at the time that brief was prepared.

In view of the fact that said case has been so recently decided, we would not refer to the facts thereof, except to draw a specific analogy between that case and the instant case.

The *Kansas City Title & Trust Company* case is decisive on the proposition that "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction" under the provisions of Section 24 of the Judicial Code.

In the *Kansas City Title & Trust Company* case a shareholder in the defendant corporation brought a bill in the District Court of the United States for the Western District of Missouri to enjoin its officers, agents and employees from investing the funds of the Company in Farm Loan bonds issued by Federal Land Banks, or Joint Stock Land Banks under authority of the Federal Farm Loan Act of July 17, 1916. A prayer for injunction was based in part upon the allegation that "the Acts by which it is attempted to authorize the bonds are wholly illegal, void and unconstitutional, and of no effect, because unauthorized by the Constitution of the United States."

This Court decided that the District Court had jurisdiction because no decision might be made of the plaintiff's case without determining the constitutionality of an Act of Congress.

In this decision of the matter, this Court was fortified by a number of its prior decisions, substantially all of which are cited in the main brief filed herein by appellees.

The analogy between that case and the case at bar is apparent. In the case at bar the plaintiffs bring a bill asking that the Federal Reserve Bank of Atlanta, and certain of its officers, be enjoined from undertaking certain things, basing the prayer for injunction upon allegations that the acts undertaken are not authorized by the Federal Reserve Act, under which the Federal Reserve Bank of Atlanta was organized (hence *ultra vires*) and that the said acts are in fact contrary to the letter and spirit of that Act.

Just as in the *Kansas City Title & Trust Company* case it was impossible to decide the issues without determining the validity of the Federal Farm Loan Act, so in the case at bar it is impossible to decide the issues undertaken to be made by the appellants, without construing the terms and provisions of the Federal Reserve Act.

It is plain, therefore, that the case as brought by plaintiffs below is one "arising under the laws of the United States" within the repeated adjudications of this Court.

While the order of removal was entered by the Superior Court of Fulton County upon an inspection of the plaintiffs' original bill without consideration of an amendment thereto, which was subsequently filed in the District Court, (record pages 63-75) yet we think this Court may now properly look to this amendment in determining the nature of the case at bar. Paragraphs 1 to 6, inclusive, of the amendment filed to the original bill undertake to allege that the defendants (below) were undertaking the collection of checks drawn on the plaintiff banks in a manner contrary to the provisions of the Federal Reserve Act. The amendment to the bill is but an amplification of similar allegations contained in the original bill.

**THE ACTS OF APPELLEES IN FOLLOWING THE
TERMS OF THE FEDERAL RESERVE ACT
CANNOT BE REGARDED AS MALICIOUS.**

In view of appellants' allegation to the effect that the appellees were maliciously endeavoring to bring about the "par clearance" of checks for ulterior purposes, we think that we may, with propriety, and without going outside of the issues in the record, cite to the Court the following paragraph from the last annual report of the Federal Reserve Board which deals with the reasons for the institution of a system of clearing checks at par:

"The Board is thoroughly convinced of the advantages of a universal system for the par collection of checks, and it brought the matter to the attention of Congress, not because of any doubt on its part as to the effect of the law, but because the issue involved the propriety of the legislation itself. The Board has

frequently had occasion to point out that in their origin exchange charges were justified on account of the necessity for, and the high cost of, actually transporting currency, but that under existing conditions those charges can be justified upon no scientific or economic principle, since the payment of checks at places other than where the drawee banks are located involves little expense and that is borne by the Federal Reserve Banks. Even the banks which decline to remit at par to the Federal Reserve Banks receive the benefits of the Federal Reserve check-clearing facilities by having the checks which they receive collected through a correspondent bank which is a member of the Federal Reserve System, although they contribute nothing to the strength of the system. To the extent that the practice of charging exchange is continued under the operation of the Federal Reserve System, it is an anachronism which permits the charging banks to impose a charge upon commerce and industry after they have ceased to perform the service which in former times justified the imposition of such a charge."

The report of the Federal Reserve Board from which the above was taken had not been issued when our main brief was prepared, hence the same was not referred to therein.

The attitude of the Federal Reserve Board in this matter is, we submit, amply justified by the meaning and spirit of the Federal Reserve Act, heretofore fully discussed in our main brief. We respectfully urge that the Court should not impute malice and a desire to injure the appellants upon the bare allegation that the Acts of appellees are undertaken for the purpose of forcing the appellant banks to join the Federal Reserve System.

CONCLUSION.

We have examined the brief filed by Counsel for appellants and, after a study of the same, we confidently submit that the same cites no case at variance with the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit. We think that the main brief filed by the appellees conclusively answers every argument or contention made by the appellants.

Respectfully submitted,

HOLLINS N. RANDOLPH,

ROBERT S. PARKER,

Solicitors and of Counsel for Appellees.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

AMERICAN BANK & TRUST COMPANY, et al., appellants, v. FEDERAL RESERVE BANK OF ATLANTA, et al., appellees.	} No. 679.
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ON APPEAL FROM FIFTH CIRCUIT COURT OF APPEALS.

BRIEF FOR THE FEDERAL RESERVE BOARD AS AMICUS CURIAE.

STATEMENT OF THE CASE.

This case comes before the Supreme Court of the United States on appeal from a decision of the Circuit Court of Appeals of the Fifth Circuit filed November 19, 1920, affirming two orders of the District Court of the United States for the Northern District of Georgia—one order denying the plaintiffs' motion to remand the case to the Superior Court of Fulton County, Georgia, and the other order dismissing the plaintiffs' complaint for lack of equity.

The suit was instituted by a number of State banks located in Georgia (R. 1), against the Federal Reserve Bank of Atlanta, one of the twelve Federal reserve banks incorporated under the Act of Con-

gress approved December 23, 1913, known as the Federal Reserve Act, 38 Stat., 251, and several of its officers (R. 2). None of the plaintiff banks have joined the Federal Reserve System.

The relief sought by the plaintiffs is an injunction to restrain the defendant Federal Reserve Bank of Atlanta from collecting checks drawn on the plaintiff banks in any manner except through the "usual and ordinary channels of collecting checks through correspondent banks or clearing houses." The admitted purpose of the plaintiffs is to prevent the Federal Reserve Bank of Atlanta from collecting checks drawn on the plaintiff banks by presentation thereof at the counter, since this method of collection prevents the plaintiff banks from deducting "exchange" charges of one-eighth of one per cent as is their custom in remitting for checks drawn on themselves when such checks are received through the mails. (R. 28-30.)

Plaintiffs allege a custom among banks whereby checks are sent, either directly or through correspondent banks, from the bank in which they are deposited to the bank upon which they are drawn, and whereby the drawee bank, in payment for the checks so received, remits by checks drawn upon its correspondents. The remittance checks are not, however, for the full face amount of the checks for which payment is thereby made, but are for the face amount less a certain percentage thereof, one-eighth of one per cent with a minimum charge of ten cents for each check received. These deductions, made by banks

when paying checks drawn on themselves by their depositors, are known as exchange charges. It is alleged that these charges cover the actual cost of the "service" rendered, including the hiring of clerks to make the necessary bookkeeping entries, and twelve and a half per cent profit thereon and that compensation for said "service" constitutes one of the most important sources of revenue of plaintiff banks. (R. 5-8.)

The bill of complaint refers to two letters which are attached thereto as Exhibits A and B (R. 16, 17). Exhibit A is a letter signed by the Governor of the Federal Reserve Board setting forth that Board's policy with regard to the collection by Federal Reserve Banks of checks drawn on nonmember banks. In the letter it is stated that the Board has encouraged Federal Reserve Banks to handle such checks since that is essential in order that those banks may render effective service to their member banks, and that since the law prohibits Federal Reserve Banks from paying exchange charges it becomes necessary, when nonmember banks refuse to remit through the mails at par, for the reserve banks to employ some means of collection which will preclude the making of such charges. (R. 30-32.) Exhibit B is a letter dated December 23, 1919, sent by the defendant Federal Reserve Bank to each nonmember bank in its Federal Reserve District which had not, prior to that time, agreed to remit at par to the Federal Reserve Bank. This letter is made the basis of the plaintiffs' charge

that defendant Federal Reserve Bank is actuated by a "malicious" intent in adopting the procedure complained of, so that it may be well to set forth the paragraph verbatim upon which this charge is predicated. It reads:

However the time has now arrived, when in justice to the 8,955 member banks of the Federal Reserve System, and the nonmember banks who maintain clearing accounts with the various Federal Reserve Banks, together with the 16,196 nonmember banks who are remitting at par we must, in compliance with the intent of the Federal Reserve Act begin receiving on deposit, at par, checks and drafts payable on presentation drawn on any bank in the United States whether a member of the Federal Reserve System or not. This will include the checks and drafts drawn upon your bank, and the purpose of this letter is to ask you that you join the vast army for par-remittance banks by advising us it will be agreeable, for us to include your name in the next issue of our par list, and that you will remit to us at par for items drawn upon you. While, as stated, the Federal Reserve Act does not permit us to pay exchange for the remittance for bank checks and drafts payable upon presentation, we can incur any cost that is necessary in order to carry out the purposes of the Act, and we would very much regret to be forced to adopt other methods of collection that would prove embarrassing, annoying and expensive to you.

The letter then continues:

In order that you may incur no expense in remitting to us at par for items drawn upon you, we will—

1. Enclose with each cash letter a stamped envelope for the return remittance.

2. Permit you to send us currency, at our expense, in payment of our letters, if you prefer to remit in that form instead of exchange. (R. 34-37.)

The plaintiffs allege that they are informed and believe and charge that defendants intend to adopt certain "embarrassing, annoying, and expensive" methods of collecting checks drawn on plaintiffs and other banks similarly situated. They allege in the first place that defendants intend to "accumulate checks drawn on petitioners or other banks in like condition in the State of Georgia until the aggregate thereof is a large amount and then sending a special messenger to the counter of the bank on which said checks are drawn and demand payment thereof in currency over the counter." In the second place they charge that defendant Federal Reserve Bank expects to "hire a special agent in each town where petitioners, or other State banks in a like town do business, and mail checks on such local bank to said agent with instructions that he present same at the counter of the bank upon which same is drawn and demand payment in currency." In the third place, they allege that defendants expect to transmit "checks to the local postmaster, or through the

express companies, for collection in currency over the counters of the bank on which they are drawn." (R. 21-24.)

In various places throughout the bill of complaint it is alleged in varying terms that the purpose of defendants in adopting these methods is to compel plaintiffs to submit to the jurisdiction of the Federal Reserve System, to force plaintiffs to join the Federal Reserve System, to coerce the plaintiffs into agreeing to remit at par, etc. (R. 21, 23, 24, 27.)

In an amendment to the bill of complaint, plaintiffs charge, upon the basis of statements purporting to come from three banks in two other districts, that there is "a combined and concerted movement of all the Federal Reserve Banks, including defendant reserve bank, to injure and damage plaintiffs and other country banks throughout the United States by depriving them of the valuable property right to charge for their services in transmitting funds through 'financial violence, fear, intimidation and oppression,' as in this bill fully set forth." (R. 70.)

The relief prayed for in the bill of complaint is that defendants be enjoined from "using, inaugurating or attempting to use, inaugurate or adopt any method of collecting checks drawn against petitioners or either of them that would prove embarrassing, annoying and expensive to petitioners," and from "collecting or attempting to collect any check against petitioners or against any other bank in like condition who may become a party hereto except in the usual and ordinary channel of collecting checks

through correspondent banks or clearing houses," and from in any manner interfering with petitioners' practice of "charging the usual and customary rate of exchange for compensation of service rendered in remitting for checks sent through the mail." (R. 29, 30.)

The bill of complaint, together with the amendment thereto, covers forty-nine pages of the record. Most of the matter therein set forth is merely argumentative and states only the pleaders' conclusions as to the purpose and construction of the Federal Reserve Act and other conclusions of law and fact. The foregoing is believed to be a fair statement of all of the material facts set forth in plaintiffs' bill and it is apparent that not all of these facts are well pleaded.

The cause was duly removed from the Superior Court of Fulton County, Georgia, to the District Court of the United States for the Northern District of Georgia. (R. 44-58.) The plaintiffs moved to remand to the State Court, and the defendants moved to dismiss the bill of complaint for lack of equity. (R. 75-84.) Both these motions were argued together before the District Court and pursuant to the decision of that court orders were entered overruling the plaintiffs' motion to remand and granting defendants' motion to dismiss. (R. 99-101, Opinion of District Court R. 101-104.)

An appeal was allowed to the Circuit Court of Appeals, Fifth Circuit (R. 105), and that court filed its opinion on November 19, 1920, affirming the decision of the District Court. (R. 120-127.) An appeal

was allowed to the Supreme Court of the United States (R. 129), and upon the joint motion of the Solicitor General and counsel for defendants setting forth that the issues involved in the cause are of great importance to the public, the argument of the appeal was advanced and set for April 11, 1921.

In view of the vital interest of the member banks of the Federal Reserve System, and of the public generally, in the Federal Reserve check clearing and collection system, and in view also of the charge made by the plaintiffs that, under the direction of the Federal Reserve Board, the Federal Reserve Banks have assumed powers not granted to them under the terms of the Federal Reserve Act and have illegally exercised the powers which are granted to them, it seems appropriate that a brief should be filed in behalf of the Federal Reserve Board as *amicus curiae*. Leave to file such a brief has been obtained, and this brief is, therefore, respectfully submitted. The brief will not attempt to discuss the jurisdictional questions, but will be limited to a discussion of the merits in an effort to show that plaintiffs have set forth no cause of action and that the decision of the Circuit Court of Appeals affirming the District Court's dismissal of the bill should be affirmed.

SYNOPSIS OF ARGUMENT.

1. The Federal Reserve Act authorizes Federal Reserve Banks to collect checks drawn on nonmember as well as member banks. Federal Reserve Banks have the power to perform "the functions of a clear-

ing house" for member banks (Federal Reserve Act, section 16), and the collection of checks drawn on nonmember banks is one of such functions, according to the usage of clearing houses. Furthermore, Federal Reserve Banks have express authority to receive deposits of all checks, including nonmember bank checks (section 13), which includes the incidental power to collect such checks.

Threll's, "The Clearing House," pp. 3, 4, 15-21.

Cannon's "Clearing House Practices," Chap. 8, Chap. 17.

Fiske's "The Modern Bank," p. 212.

2. One of the purposes which the Federal Reserve Act aims to accomplish is the establishment of a Federal Reserve check collection system, affording facilities to member banks for the collection of checks at par without deduction of exchange charges.

Congressional Record, 65th Congress, 1st sess., Vol. 55, Part 2, pp. 1984, 1988-9, 1993, Part 4, pp. 3528, 3541, 3543, 3606, 3609, 3611-14, 3618.

3. Federal Reserve Banks are expressly prohibited from paying exchange or collection charges to member or nonmember banks, but may incur any expense necessary or incidental to the collection of checks which does not involve the payment of such charges (section 13).

National Bank v. Matthews, 98 U. S. 621.

Blair v. Chicago, 201 U. S. 400, 450.

4. Methods of collection which it is alleged defendants intend to put into effect and which plaintiffs seek to enjoin are legal, since any holder of a check has a right to demand payment thereof at the counter of the drawee bank.

5. There is no illegal purpose or malicious intent upon which to base a cause of action for duress, illegal conspiracy or unfair competition. The methods of collection are legal in and of themselves and are within the corporate powers of the defendant Federal Reserve Bank and are in their nature designed to further the lawful purpose of rendering service to member banks and of developing the par collection system. These facts negative the bare allegations that defendants are actuated by an illegal purpose and a malicious intent.

Brennan v. United Hatters, 73 N. J. L. 729; 65 Atl. 165.

Pickett v. Walsh, 192 Mass. 572; 78 N. E. 753.

Plant v. Woods, 176 Mass. 492; 57 N. E. 1011.

W. Va. Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 624; 40 S. E. 591, 597.

Doremus v. Hennessy, 176 Ill., 608; 52 N. E. 924.

McKee v. Hughes, 181 S. W. 930.

Walker v. Cronin, 107 Mass. 555, 564.

6. Inequity of exchange charges and policy of Federal Reserve Board with respect to par collection.

ARGUMENT.

Federal Reserve Act expressly authorizes defendant Federal Reserve Bank to collect checks drawn on nonmember banks.

Section 16 of the Federal Reserve Act provides that the Federal Reserve Board may exercise the functions of a clearing house for the Federal Reserve Banks and may require each Federal Reserve Bank to exercise the functions of a clearing house for its member banks, and section 13, as amended by the acts approved September 7, 1916, 39 Stat. 752, Chap. 461, and June 21, 1917, 40 Stat. 232, Chap. 32, expressly authorizes the Federal Reserve Banks to receive from their member banks deposits of "checks, and drafts, payable upon presentation." That Congress had the specific intent to include among such checks checks on nonmember banks as well as checks on member banks is shown by the fact that in section 13 as originally enacted the only checks and drafts expressly mentioned were "checks and drafts upon solvent member banks or other Federal Reserve Banks." In view of these two provisions of the act it would seem apparent that a Federal Reserve Bank, in its capacity as a clearing house for its member banks, may receive and collect checks drawn on nonmember as well as member banks.

It has never been suggested, except in the briefs which have been filed by plaintiffs in this case, that the provisions referred to do not confer full authority upon the Federal Reserve Banks to perform for member banks any and all services which naturally and

logically might come within the scope or purpose of a clearing house, or that the collection of checks drawn on nonmember banks is not a service which comes within the scope and purpose of a clearing house within the intent of these provisions.

The appellants argue, however, commencing on page 160 of their brief, that the Federal Reserve Banks have no authority to undertake the collection of checks drawn on nonmember banks.

As a basis for this contention it is stated in effect that no clearing house has ever undertaken the collection of checks on banks which are not members of that particular clearing house. Anyone who has even a slight knowledge about clearing houses knows that this statement is contrary to the fact. In 1899 the Boston Clearing House, of which no banks outside of Boston were members, undertook the collection of checks drawn on all Massachusetts banks located outside of Boston, and shortly thereafter the service was extended so as to include the collection of checks on banks in all the New England States. Similar "Country Clearing Houses" have since been established in Kansas City, Mo.; Nashville, Tenn.; Atlanta, Ga.; Oklahoma City, Okla.; St. Louis, Mo.; New York City; Richmond, Va.; Detroit, Mich.; and several other cities. *The Clearing House*, by Jerome Thralls, Secretary of the Clearing House and National Bank Sections of the American Bankers Association (1916), p. 15 et seq. *Clearing House Practices* by J. G. Cannon, Vice President of the Fourth National Bank of New York, Chapters 8 and 17.

Senate Document 491, printed in volume 6 of the publications of the National Monetary Commission, created by the act of Congress approved May 30, 1908, to inquire into and report to Congress what changes are necessary or desirable in the monetary system of the United States.

The "functions of a clearing house" as that term is used in section 16 of the Federal Reserve Act, and according to its natural meaning, includes any service to member banks which may come within the scope and purpose of a clearing house. What that scope and purpose may be is shown by the following quotation from the book just referred to entitled "The Clearing House," by Jerome Thralls, pages 3 and 4:

The objects and purposes of a modern Clearing House Association might be stated as follows:

(1) To facilitate the handling of business between its members.

(2) To facilitate the handling of business between these institutions and banks and trust companies of other localities.

(3) To foster and encourage conservative, safe, and sound banking methods and banking practices.

(4) To use its influence in matters of common interest to its members, and for the general good of the community wherein it is located.

(5) To perform such other services as are agreed upon by its members and which are not in contravention of Federal or state laws.

The performance of such functions is generally undertaken through three separate departments, namely (1) the City Department, (2) the Country Department and (3) the Examination Department.

As a matter of fact the first Federal Reserve Bank to put into operation a clearing and collection system with facilities for handling checks drawn on all the banks in its district was the Federal Reserve Bank of Boston, and this was accomplished when that bank took over the operation of the Boston Country Clearing House in July, 1916. In view of this fact and in view of the additional fact that the clearing and collection departments of the various Federal Reserve Banks have been modeled to a large extent after the Boston Country Clearing House, it may be appropriate and helpful to quote from Mr. Thrall's book the following extracts from the chapter on "The Country Department" of clearing houses describing in particular the operations of the Boston Country Clearing House, pp. 15-21.

The personal check has been a great factor in the development of all lines of industry throughout the United States, and with the unprecedented growth of this nation there came an attending increase in the volume and number of such checks. The burden of labor and expense involved in handling these items constantly increased, and in some of the large collection centers this burden grew to such enormous proportions that it consumed the earnings of the banks and jeopardized their

existence. Boston, Massachusetts, was the first center to feel keenly the effects of the expense of handling out-of-town personal checks, and the weight of exchange that was being charged thereon. The Boston banks realized the important part that these checks were playing in the business world, and the necessity for their continued use, yet they were obliged to seek some means of reducing the burden of expense incurred in their handling. They accordingly created a "Country Collection Department" or "Country Clearing House," as it is generally termed. Kansas City, Mo., Nashville, Tenn., Atlanta, Ga., and Oklahoma City, Okla., rapidly followed the lead of Boston. St. Louis, Mo., New York City, Richmond, Va., Detroit, Mich., and several other cities have organized similar departments. The Country Clearing House might best be understood by considering it as a cooperative bank owned by the Clearing House Association and with its functions limited to the collection of out-of-town cash items on a certain territory, and the performance of services incidental thereto, and with its depositors limited to the members of the Clearing House Association.

The manager in charge is given full power to make arrangements with the banks in the territory covered, and proceeds very much along the same lines as does the officer of a bank in making connections for his institution. Strength, service, and rates are the principal factors in determining as to what bank, or banks, the Country Clearing House

will send its items on towns where there are two or more banks. A circular letter explaining the plan is sent to each bank in the district by the manager. This letter is followed by a card requesting certain information, including a list of the bank's correspondents, a list of the bank's officers, the time of arrival and departure of mails, the rate of exchange, if any charge is to be made on cash items, and a statement of the financial condition of the institution. These cards are filed for future reference, and in case of doubt as to the validity of the information given thereon, it is checked up and further investigation of the character of the officers and the general character of the institution is made through its correspondents and other sources. When the arrangements have been perfected, each member of the Clearing House is furnished with a book giving a complete list of all banks to which the Clearing House has arranged to send items and the rate of exchange that will be charged by each. Members are informed, from time to time, of all changes in and additions to this list.

* * * * *

The Country Clearing House is represented as a member in the daily exchanges at the Clearing House, and in that way distributes the returns and secures credit for all returned items, and the members charge to the Country Clearing House the checks or due bills which have been issued in lieu of items deposited with the department for collection. In some

Country Clearing Houses the estimated time required for getting returns is so close to the actual time that the due bills, as they become payable, just about offset the returns, and the small debit and credit balances that arise because of their not being an exact offset, are carried over by the bank that falls heir to the same until the following day; while in other places the amount due to each member is figured each day and new bills are issued for the exact amount due. The office or operating expenses of the department are prorated monthly on the basis of the total business and the total number of items handled through the department for the month. The exchange charges are assessed against the members at the close of each month, each member being charged with the actual cost of its items. These charges are taken from the letters as they are paid and are figured and totaled up each day. The plan is, therefore, fair and equitable to all Clearing House members. The Country Clearing House does not interfere with the individual arrangements of its members with their correspondents, but merely gives them the benefits of additional facilities. It is a machine operated strictly for economy and better service. It materially reduces exchange charges, encourages more prompt returns, and lessens every item of expense incidental to handling of out-of-town checks.

Ten members have items on a certain town, the minimum postage is 2 cents each or 20 cents for all, while, were the items consolidated and

sent from the Country Clearing House in one inclosure, the total postage would be from 2 cents to 4 cents and a saving from 16 cents to 18 cents would be effected. The saving on two thousand towns would be from \$32 to \$36 per day on postage alone. In addition, there is a saving of nine remittance letters, nine envelopes, and a corresponding saving of labor in handling the returns. The same is true with reference to tracing and correspondence, and from the standpoint of the country banker, it relieves him of considerable work, since he is required to write one draft instead of ten, address one envelope instead of ten, and use 2 cents in postage instead of 20 cents. One of the Country Clearing Houses, in handling items on 5,600 banks, has effected a saving of more than 50 per cent in the gross expense involved, and has reduced the time required for getting returns more than 25 per cent. The Boston Country Clearing House has succeeded in making arrangements whereby it receives par returns from 90 per cent of the banks in the entire New England States, and has reduced the cost of handling to the low minimum of 7 cents per thousand dollars or about one-third of a cent per item. Other Country Clearing Houses in operation have made corresponding progress.

See also *The Modern Bank*, by A. K. Fiske (1914), p. 212.

One of the purposes of the Federal Reserve Act is the establishment of a universal par collection system.

Section 16 of the Federal Reserve Act contains the following paragraphs:

Every Federal Reserve Bank shall receive on deposit at par from member banks or from Federal Reserve Banks checks and drafts drawn upon any of its depositors, and when remitted by a Federal Reserve Bank, checks and drafts drawn by any depositor in any other Federal Reserve Bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons. The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal Reserve Bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal Reserve Bank.

The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal Reserve Banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal Reserve Banks, or may designate a Federal Reserve Bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for its member banks.

These paragraphs were contained in the act as originally enacted and have never been amended.

That the last paragraph gives to Federal Reserve Banks authority to collect checks drawn on non-member banks, as well as checks drawn on member banks, has already been demonstrated. This in itself shows that Congress intended to give to the Federal Reserve Banks, acting under the supervision of the Federal Reserve Board, the power to establish a country-wide check clearing and collection system affording facilities to the member banks whereby checks on all banks could be collected scientifically and economically. A study of the legislative history of the amendments to section 13 of the Federal Reserve Act establishes the further facts that Congress has sanctioned, approved, and encouraged the efforts of the Federal Reserve Banks and the Federal Reserve Board to establish the only kind of a check clearing and collection system which would be either scientific or economical or fair, namely, a system whereby all checks can be collected at par.

In May, 1916, the Federal Reserve Board issued its first circular on the subject of check clearing and collection, stating that under authority of section 16 it would require each Federal Reserve Bank to "exercise the functions of a clearing house for its member banks" commencing June 15, 1916, or as soon thereafter as possible. The system was in fact inaugurated July 15, 1916. As outlined in that original circular the check-collection facilities of each Federal Reserve Bank were at first to be limited

primarily to "checks drawn on all member banks, whether in its own district or other districts," although it was stated that "it is proposed to accept at par all checks drawn upon nonmember banks when such checks can be collected by the Federal Reserve Banks at par. * * * It is the purpose of the Federal Reserve Board to have the collection system developed so as to embrace the collection of all checks on nonmember banks and private banks, and while this can not be done immediately, steps will be taken to afford these facilities as rapidly as possible." (See Senate document 184, 66th Congress, 2nd Session, Report of Governor of Federal Reserve Board made in response to Senate Resolution 284, dated January 19, 1920.)

Immediately upon the inauguration of the system the Federal Reserve Bank of Boston took over the Boston Country Clearing House and by this means was able to collect checks drawn upon any bank, member or nonmember, located in New England. In other districts also many nonmember banks agreed to remit at par at the outset.

Prior to September 7, 1916, the first paragraph of section 13 read as follows:

Any Federal Reserve Bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal Reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from

other Federal Reserve Banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal Reserve Banks, payable upon presentation.

It is to be noted that under the terms of this paragraph the only checks which Federal Reserve Banks were specifically authorized to receive from member banks were "checks and drafts upon solvent member banks." By the act approved September 7, 1916, this paragraph was amended to read as follows:

Any Federal Reserve Bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal Reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal Reserve Banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal Reserve Banks, and checks and drafts, payable upon presentation within its district, and maturing bills payable within its district.

This amendment gave specific authority to Federal Reserve Banks to receive on deposit all "checks and drafts, payable upon presentation" without further qualification. By this amendment Congress must be deemed to have put its stamp of approval upon the efforts theretofore inaugurated by the Federal Reserve Banks to collect both member and nonmember

bank checks in their capacities as clearing houses for their member banks.

By the act approved June 21, 1917, Congress again amended the terms of the first paragraph of section 13 so that it now reads:

Any Federal Reserve Bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal Reserve notes, or checks, and drafts, *payable upon presentation*; and also, for collection, maturing notes and bills; or, solely for purposes of exchange or of collection, may receive from other Federal Reserve Banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal Reserve Banks, and checks and drafts, payable upon presentation within its district, and maturing notes and bills payable within its district; or, solely for the purposes of exchange or of collection, may receive from any nonmember bank or trust company deposits of current funds in lawful money, national-bank notes, Federal Reserve notes, checks and drafts payable upon presentation, or maturing notes and bills: *Provided*, Such nonmember bank or trust company maintains with the Federal Reserve Bank of its district a balance sufficient to offset the items in transit held for its account by the Federal Reserve Bank: *Provided, further*, That nothing in this or any other section of this act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regu-

lated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but no such charges shall be made against the Federal Reserve Banks.

The purpose of this last amendment was to permit nonmember banks to become clearing members of the Federal Reserve Banks; that is, to permit such institutions to avail themselves of the privileges of the check collection system without becoming regular members, provided they maintain with the Federal Reserve Banks deposits sufficient to offset items in transit. The amendment was intended primarily for the benefit of those nonmember banks which were ineligible for full membership either because of a lack of sufficient capital or for other reasons. Prior to the final enactment of this amendment the pros and cons of a Federal Reserve par collection system were thoroughly discussed before both the House of Representatives and the Senate. In the bill as originally introduced in the House of Representatives and as passed by that body the first paragraph of section 13 did not contain any part of the last proviso. The Senate, however, adopted an amendment known as the Hardwick Amendment by adding the following proviso:

Provided further, That nothing in this or any other section of this act shall be construed as prohibiting a member or nonmember bank

from making reasonable charges, but in no case to exceed ten cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks or drafts or remission therefor by exchange or otherwise.

The proponents of this amendment intended, of course, to authorize both member and nonmember banks to charge exchange even on checks collected through the Federal Reserve Banks. After a full discussion, the final clause of the first paragraph of section 13 was added to the so-called Hardwick Amendment, providing that "but no such charges shall be made against the Federal Reserve Banks." The original Hardwick Amendment was also modified so as to provide that the reasonable charges to be made by member or nonmember banks between themselves should be determined and regulated by the Federal Reserve Board.

In the course of these congressional debates it was clearly brought out that the opposition to par collection emanated from the nonmember banks, which were objecting to the policy which had previously been adopted by the Federal Reserve Banks of collecting checks drawn upon such nonmember banks whenever such collections could be made at par. Those who favored the original Hardwick Amendment, which would have authorized both member and nonmember banks to charge exchange against Federal Reserve Banks, advanced the same arguments

that are advanced by the appellants in the case at bar, namely, that the protection of the right to charge exchange was essential to the nonmember country banks and that the imposition of such charges was only fair, in view of the "service" rendered.

On the other hand, those who opposed the Hardwick Amendment in its original form and who ultimately succeeded in having it modified so as to prohibit the making of exchange charges against Federal Reserve Banks pointed out that exchange charges constituted an unreasonable and unwarranted tax upon the business and commerce of the country and could not be justified by the alleged service rendered by the drawee bank. It was also pointed out that the Federal Reserve Bank of Boston having taken over the Boston Country Clearing House was collecting checks on all nonmember banks in its district and that other Federal Reserve Banks were collecting checks on many nonmember banks in their districts, in some cases by making presentation at the counter, and that the extension of the Federal Reserve check clearing system to the ultimate end that all checks should be collectible at par was an accomplishment greatly to be desired both in the interests of the business of the country and for the effective strengthening of the country's banking resources. (See Congressional Record, 65th Cong., 1st sess., Vol. 55, Part 2, pp. 1984, 1988-9, 1993; Part 4, pp. 3528, 3541, 3543, 3606, 3609, 3611-14, 3618.)

It thus appears that while considering the bill which became law on June 21, 1917, Congress had before it and thoroughly discussed the question whether Federal Reserve Banks should be permitted to pay exchange charges on checks and drafts drawn on member and nonmember banks; that the Federal Reserve Banks at that time were handling checks on nonmember banks which could be collected at par, and were even at that time doing precisely what plaintiffs complain of, that is, presenting checks at the counters of the drawee banks for payment in cash; that the Federal Reserve Board had already announced as its policy the ultimate establishment of a universal par collection system; and that Congress finally wrote into the law the provision which prohibited Federal Reserve Banks from paying exchange to either member or nonmember banks. It is submitted that in view of all these circumstances there can be no doubt of the truth of what was said in the opinion of the Circuit Court of Appeals:

The Federal Reserve Act does not only not evince a purpose to deny to the Reserve Bank the power to collect checks of nonmembers and nondepositing banks, but exhibits a general policy to encourage a uniform and universal system, of par clearance, which could only be accomplished by conferring power upon the Reserve Bank to handle checks drawn on on all banks upon any terms that might be essential except the payment to the remitting bank of compensation for remitting.

Federal Reserve Banks are prohibited by law from paying exchange or collection charges made by member or nonmember banks, but may incur any expense necessary or incidental to the collection of checks which does not involve the payment of such charges.

The first paragraph of section 13 of the Federal Reserve Act, quoted on pages 23 and 24 of this brief, provides that Federal Reserve Banks may receive from member banks and from nonmember bank which maintain clearing accounts deposits of "checks and drafts, payable upon presentation," and concludes with the proviso added by the amendment of June 21, 1917, reading as follows:

Provided, further, That nothing in this or any other section of this act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but no such charges shall be made against the Federal Reserve Banks.

The last clause of this paragraph prohibits Federal Reserve Banks from paying an exchange or collection charge to any bank, whether a member or a nonmember bank. This is the plain import of the language of the proviso and is admitted by plaintiffs.

Plaintiffs go further, however, and urge that the effect of this proviso is to prohibit Federal Reserve

Banks from paying any fee or charge to any agent in connection with the collection of checks, upon the ground that the purpose of the proviso was to conserve the funds of Federal Reserve Banks by prohibiting them from incurring expense in the collection of checks.

This contention is untenable for the reason that the language of the proviso and the legislative history of the amendment of June 21, 1917, show that the term "such charges," as used in the final clause, refers to charges for exchange or collection made by banks only. The original Hardwick Amendment, which did not contain this final clause, was suggested for the express purpose of authorizing commercial banks to make exchange charges against Federal Reserve Banks, and the final clause was added in order to defeat this specific purpose and to preserve the Federal Reserve *par* collection system in so far as it had been developed up to that time, and to encourage its further development by making it a legal impossibility ever to convert the *par* collection system into a collection system which would perpetuate the unwarranted practice on the part of banks of charging exchange when paying their own checks. To construe the final clause of the first paragraph of section 13 as prohibiting Federal Reserve Banks from incurring any expenses other than exchange or collection charges paid to banks would be to go far beyond the intent and purpose of Congress as indicated by the language used and the evil aimed at. There is no basis for plaintiffs' contention that the purpose

of prohibiting Federal Reserve Banks from paying exchange or collection charges was to save money for the Federal Reserve Banks. There is no hint of such a purpose in any of the long discussions which were had while the question of par collection was being fought out in Congress. On the contrary, as has already been demonstrated, Congress intended to encourage the Federal Reserve Banks in their efforts to enlarge the scope and volume of the collection service they were then rendering to member banks. While this enlargement would, of course, decrease the relative cost of that service, as compared with the volume of items handled, it would nevertheless increase the absolute cost to the Federal Reserve Banks.

The opinion of the Circuit Court of Appeals contains a thorough discussion of this particular point and effectively disposes of plaintiffs' contention in the following language:

Whether Appellants' construction of the prohibiting clause is correct depends upon the purpose it was intended to subserve. Appellants' contention is that its purpose was to conserve the assets of the Reserve Bank. Appellees' contention is that it was to aid in accomplishing a uniform par clearance system. In view of the purpose of Congress to effect the latter object, we think the Appellees' construction is the correct one, and that the prohibition is limited to a charge against and payment of the charge to a remitting bank, and does not prevent the Federal Reserve Banks from expending money for col-

lection of checks in any other way in an endeavor to accomplish a uniform system of par clearance. It follows that the acts of the Federal Reserve Bank complained of are within its legal powers. Conceding that they were ultra vires solely because entailing an unauthorized disposition of the banks' assets, the Appellants and Intervenor, who were neither stockholders nor creditors of the Reserve Bank, would have no standing to complain of such a disposition, because of a collateral injury to them. The right to make complaint on that ground would be confined to the United States or to individuals who were injured by the depletion of the banks' assets. If the purpose of the prohibition was altogether to save expense to the Federal Reserve Banks and if the Statute evinced no policy to prevent the Reserve Banks from handling checks of nonmembers and non-depositing banks, if it incurred no expense; the mere incidental injury that Appellants suffered from the handling of such checks, would give it no right to complain of an expenditure from which it could suffer no injury. The Federal Reserve Act does not only not evince a purpose to deny to the Reserve Bank the power to collect checks of nonmembers and nondepositing banks, but exhibits a general policy to encourage a uniform and universal system of par clearance, which could only be accomplished by conferring power upon the Reserve Bank to handle checks drawn on all banks upon any terms that might be essential except the payment

to the remitting bank of compensation for remitting.

Furthermore, as the Circuit Court of Appeals points out, the plaintiffs would have no right to complain because the defendant Federal Reserve Bank undertakes the collection of checks drawn on plaintiffs even though such collections involved an unauthorized disposition of funds on the part of defendant. Plaintiffs do not suggest that the prohibiting clause at the end of the first paragraph of section 13 was written into the law for their protection, but contend only that it was to conserve the assets of the Federal Reserve Banks. It is clear, therefore, that only the United States or those parties who would be injured by a depletion of the assets of the Federal Reserve Banks may question the construction which has been placed upon the statutory provision by the Federal Reserve Board, the governmental agency charged with the administration of the Federal Reserve Act.

National Bank v. Matthews, 98 U. S., 621.
Blair v. Chicago, 201 U. S., 400, 450.

Acts which plaintiffs seek to enjoin are legal.

It is a fundamental principle that the holder of a check has a right to present it to the drawee bank and demand payment in cash, and has the right to have such presentation and demand made by any agent of his selection. As the plaintiffs say in the eighth paragraph of their bill of complaint: "The initial and primary obligation of the bank upon which a check is

drawn is to pay the same over its counter in current funds on demand, charging the amount of the same against the deposit account of the drawer of said check."

The specific methods which plaintiffs allege defendants intend to adopt in collecting checks drawn on plaintiffs are merely different ways of making presentation of those checks at the plaintiffs' counters. The first method alleged to be in contemplation of defendants involves presentation by a "special messenger." The second method involves presentation by a "special agent in each town," and the third method presentation by "the local postmaster, or though the express companies." In connection with the first-mentioned method the allegation is made that defendants intend to "accumulate checks drawn on petitioners or other banks in like condition in the State of Georgia until the aggregate is a large amount." No similar charge is made as to the other two alleged methods.

There can be not the slightest doubt as to the legality of the second and third methods for they involve only the presentation by an authorized agent of the Federal Reserve Bank at the counters of the drawee banks of checks drawn on those banks. This is merely making demand upon the drawee banks that they fulfill their "initial and primary obligation" to pay over their counters in current funds on demand the checks drawn by their depositors.

It is submitted, also, that the first method is not made illegal by the charge of an intent to accumu-

late. Even if it were conceded that the accumulation of checks in a definite amount and the subsequent presentation thereof for the malicious purpose of injuring the drawee banks might be alleged in such terms as to sustain a cause of action on demurrer, it is clear that the allegations contained in the bill do not make out any such cause of action even for the purposes of pleading. No malicious purpose can be attributed to defendants, since, as is shown by the exhibits which plaintiffs have annexed to their bill, all the acts which defendants are alleged to have in contemplation are in furtherance of the bona fide efforts of the Federal Reserve Banks and the Federal Reserve Board to develop and perfect the Federal Reserve par collection system in the interests of the member banks and the public, a system which Congress has authorized and encouraged them to establish and develop. There is no charge of accumulation in any manner not consistent with this policy undertaken in good faith. Where presentation must be made by a special messenger sent from the collecting bank it is impossible to make presentation of each check the moment it is received. Some "accumulation" is, therefore, unavoidable. If the delay in making presentation results in loss, the drawer may be excused from his secondary liability to the holder, but the delay is not a matter of which the drawee bank can complain.

It is important to note in this connection that plaintiffs' prayer for relief is not aimed to prevent an accumulation of checks, but is aimed to prevent

defendants from collecting any check drawn on plaintiffs "except in the usual and ordinary channel of collecting checks through correspondent banks or clearing houses," and to prevent defendants from adopting "any method of collection of checks drawn against these petitioners * * * in any manner that would prove embarrassing, annoying, and expensive to the bank upon which said check is drawn, or in any manner other than the ordinary channels and processes for collection of checks now in force and well understood in banking circles." Plaintiffs also ask that the injunction and restraining order "be so worded as to prevent the defendants or either of them from in any manner interfering with petitioners or any other bank, who may become a party hereto, from charging the usual and customary rate of exchange for compensation of service rendered in remitting for checks sent through the mail."

The scope of these prayers make it apparent that plaintiffs seek to prevent defendants from collecting checks in any manner which does not permit the plaintiff banks to make exchange charges. Even if it be conceded for the purposes of this case that a collecting bank which sends checks to one of the plaintiff banks through the mails constructively consents to the exaction of an exchange charge by the drawee bank, it is absurd to argue from this that the plaintiff banks have the right to compel the rest of the banking world to regulate its business to the end that all the checks drawn by plaintiffs' depositors will be sent to

plaintiffs through the mails. Upon this point the Court of Appeals said:

If the Federal Reserve Bank had availed itself of the services of the complaining banks in the remission of the proceeds of checks sent them for collection through the mails, in view of their known usage to deduct for exchange, it would have been liable for the reasonable value of such services, except for the statutory inhibition against it. The purpose of the bill, however, is not to collect compensation for services rendered and to which the banks had a property right; but to compel the Federal Reserve Bank to avail itself of services, which it was unwilling to and disabled from accepting, by restraining it from using any other method which did not require the use of such services. Complaining banks had no property right that was infringed by the refusal of the Federal Reserve Bank to avail itself of their services in remitting or that a court of equity could be called upon to protect. It was under no legal duty to accept the services of the complaining banks, even had there been no statutory obstacle to its doing so. It also had the legal right to present the checks of the complaining banks to them for payment singly or in numbers over their counters, and it was the absolute duty of the complaining banks to pay the full amount of such checks without deduction, when so presented.

The collection of checks through the mails is the most convenient method for all concerned, and this method is habitually followed by Federal Reserve

Banks unless there is some reason which makes it imperative to adopt some other method of collection. In the case at bar the reason which requires the adoption of other methods is that the drawee banks insist upon making exchange charges when remitting through the mail, which charges the Federal Reserve Banks are prohibited by law from paying. A number of other reasons suggest themselves which might and frequently do necessitate the personal presentation of checks. One is the failure of the drawer bank to make remittance promptly. Another is the knowledge that the drawee bank is in an unsafe condition. In this latter case it would be the imperative duty of the Federal Reserve Bank, or of any other collecting bank, to make personal presentation at the earliest possible moment, since any other course of action might result in loss. Yet plaintiffs argue that they are entitled to an injunction which would prevent the presentation of checks at the counters of the plaintiff banks under any and all of these circumstances.

There is no illegal purpose or malicious intent upon which to base a cause of action for duress, conspiracy, or unfair competition.

Plaintiffs seek to sustain their bill by charging that defendants are actuated by an illegal purpose and a malicious motive in adopting the alleged methods of collection pursuant to which the acts are to be performed. Plaintiffs now admit that no cause of

action for duress is set forth in the bill, but they argue that the allegation of an illegal purpose and malicious motive is sufficient to sustain the cause of action for "unfair competition" and "illegal conspiracy."

It is no avail, however, for the plaintiffs to argue that acts otherwise lawful may be unlawful by reason of an illegal or malicious motive, because there is no ground in the case at bar upon which to base a charge that defendants are actuated by an illegal or malicious motive in the adoption of the collection methods sought to be enjoined.

It has been shown that Congress has conferred upon Federal Reserve Banks authority to act as clearing houses for the benefit of their member banks and in such capacities to render service to member banks in the collection of checks drawn on either member or nonmember banks, but has prohibited the Federal Reserve Banks from paying exchange charges to member or nonmember banks; and, furthermore, that Congress in amending the Federal Reserve Act has indicated a policy to encourage Federal Reserve Banks to extend their collection services to the ultimate end they may be able to afford to their member banks facilities for the par collection of all checks.

It follows that if the intention of Congress is to be carried out Federal Reserve Banks must, when any nonmember banks decline to remit through the mails at par, undertake the collection of the checks drawn on those nonmember banks by some means which will not involve the payment of exchange charges. This

is just what the defendant Federal Reserve Bank is alleged to have in contemplation. The letters of the Federal Reserve Board and of the defendant Federal Reserve Bank, which are annexed to the plaintiffs' bill as Exhibits A and B, respectively, and upon which plaintiffs predicate their charge of an illegal purpose and malicious motive, show that defendants intend, in good faith and in accordance with the policy of the Federal Reserve Board and in accordance with that Board's construction of the law, to adopt the methods of collection of which plaintiffs complain so as to extend the scope of the Federal Reserve collection service afforded to member banks. (R. 30-37.)

The adoption of the collection methods will, therefore, serve a purpose which is justified as a matter of law and as a matter of banking policy. There being such a justification for the acts which plaintiffs seek to enjoin, the bare allegation that defendants are actuated by an illegal purpose or a malicious motive is without effect. The alleged illegal purpose is conclusively negated by the fact that the defendants intend to do just what the law purposed they should do, and the malicious motive is conclusively negated by the fact that the acts contemplated are the natural means and the only means of accomplishing these lawful purposes. Malice is merely the absence of just or sufficient cause, and the cases establish that where the defendants' acts are justified upon the ground of business competition, no malice or illegal

purpose can be imputed to defendants in the performance of those acts.

Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165.

Pickett v. Walsh, 192 Mass. 572; 78 N. E. 753.

Plant v. Woods, 176 Mass. 492; 57 N. E. 1011.

W. Va. Trans. Co. v. Standard Oil Co. 50 W. Va. 611, 624; 40 S. E. 591, 597.

Doremus v. Hennessy, 176 Ill. 608; 52 N. E. 924.

Similarly, no malice can be imputed where the acts are for the public good even though the plaintiff may be injured thereby:

McKee v. Hughes, 181 S. W. 930.

Any incidental injury that plaintiff may sustain as a result of such acts is *damnum absque injurie*, and cannot sustain a cause of action:

Walker v. Cronin, 107 Mass. 555, 564.

This disposes of the argument that the bill sets forth a cause of action for illegal conspiracy, duress, or unfair competition, since any such cause of action must, even on the plaintiffs' own statement, be predicated upon an illegal purpose and a malicious motive on the part of defendants.

Inequity of exchange charges and policy of Federal Reserve Board with respect to par clearance.

That the member banks of the Federal Reserve System and the public generally derive great benefit from the Federal Reserve par collection system, and

that the extent of such benefit is directly dependent upon the scope of that collection service needs no demonstration. It is a matter of common knowledge that the volume of checks used as a means of settling debts due from a debtor in one locality to a creditor in another locality is enormous. If an exchange charge of one-tenth of 1 per cent, or one-eighth of 1 per cent which is the plaintiffs' objective, should be deducted when each of such checks is paid, the annual aggregate of such deductions would constitute an appalling tax upon the business and commerce of the country, which tax would accrue solely to the benefit of the banks exacting the exchange charges.

Historically, exchange charges are a survival from a period when commerce was comparatively undeveloped. In their origin some such charge may have been justified on account of the necessity for and the high cost of actually transporting currency, but under existing conditions exchange charges can be justified upon no scientific or economic principle, since the payment of checks at places other than where the drawee banks are located involves little expense, and that is borne by the Federal Reserve Banks as is shown from the letter of Defendant Federal Reserve Bank Exhibit B, annexed to the bill of complaint. Even the banks which decline to remit at par to the Federal Reserve Banks derive the full benefits of the Federal Reserve check clearing facilities by having the checks which they receive collected

through a correspondent bank which is a member of the Federal Reserve System.

In a number of places in the appellants' brief the suggestion is made that a bank has the same justification for making a charge for the "service" it renders in paying its own checks, as express companies and the post office have for the remission of funds from one place to another. The error lies in the fact that the argument fails to take account of the difference in the nature of the business of banks on the one hand and express companies and the post office on the other.

Banks have the use of their customers' money and for that use they pay nothing or at most a low rate of interest. The bank makes its profit by loaning out its customers' money at high rates of interest. The customer could obtain that high rate of interest if he made the loan instead of the bank and he is willing to relinquish the opportunity to do so only because he expects the bank to perform some compensatory service. That service is the furnishing of convenient facilities whereby the customer may pay his obligations. The consideration which moves the bank to perform that service is the profit derived from the use of the customers funds. Now, plaintiffs say, the bank is entitled to further compensation for remitting in payment for the checks drawn by the customer, because it costs the bank something to hire clerks to make the necessary book entries. It is submitted, however, that clerk hire is merely a part

of the overhead expense necessarily incident to the banking business and to the furnishing of the service which every bank must render to its customers, and is not in any sense an expense of remitting for checks.

In so far as there is any service rendered by the bank in making remittances to distant places, it is rendered for the customers of the bank who are thereby enabled conveniently to pay their debts due at distant places. If, however, the alleged expense of this service were charged against the bank's customer, for whom the service is rendered, the bank would soon have no customers, for the customer rightly figures that he is paying for this service by permitting the bank to derive a profit from the use of his money. The bank, therefore, demands a fee from the holder of the check, and the holder usually pays it, not because there is any reason why he should have to pay such a fee, but because the amount involved in any one case is not sufficient to make it worth while for him to insist upon full payment of the debt due him.

In the case of express companies and the post office the parties rendering service do not have the use of money belonging to others so that a specific charge is justified, and that charge normally is paid by the person for whose benefit the service is rendered instead of by that person's creditor.

Where a debtor in one town pays a debt due his creditor in another town by means of a postal money order, it would scarcely be contended that the post

office is rendering service to the creditor or that the creditor should be satisfied with a money order for the amount of the debt less the fee for obtaining the money order.

The fact is that the drawee bank does not render a "service" in any proper sense of that word, when it remits in payment for a check drawn on itself. It is merely fulfilling its obligation to the depositor to honor the depositor's checks so long as the depositor maintains a sufficient balance.

The inconsistency of the plaintiffs' position is shown by the fact that in one breath they say that the payment of checks by mail involves an expense for which they are entitled to compensation and in the next breath they claim that they are entitled to an injunction to prevent the defendant reserve bank from presenting checks for payment at their counter, which method of presentation would, of course, relieve the plaintiff banks from any extra expense involved in remitting by mail.

The charge is made throughout the bill of complaint and throughout appellants' brief that the Federal Reserve Banks and the Federal Reserve Board are seeking to dominate and control the nonmember banks in an effort to accomplish universal par clearance. In answer to this charge the Federal Reserve Board desires to state again that in encouraging and assisting the Federal Reserve Banks to extend the collection facilities afforded by them to their member banks it has been performing what it deems to be its solemn duty under the law to employ all reasonable

means for the accomplishment of universal par clearance and for the extension of the Federal reserve collection system in the interests not only of the member banks, but of the commerce and business of the country.

In order that the position of the Federal Reserve Board with respect to par clearance may be made clear to the court, there is annexed to this brief as an appendix the article on the subject of Check Clearing and Collection, which appeared on pages 63 to 69 of the Seventh Annual Report of the Federal Reserve Board covering its operations for the year 1920, which report was made as required by law and submitted to the Speaker of the House of Representatives on February 16, 1921.

CONCLUSION.

The decision of the Circuit Court of Appeals affirming the orders of the District Court should be affirmed.
Respectfully submitted.

WALTER S. LOGAN,

General Counsel Federal Reserve Board.

WILLIAM L. FRIERSON,

Solicitor General.

APPENDIX.

[Extract from pp. 63-69 of Seventh Annual Report of Federal Reserve Board for the year 1920, made as required by law and submitted to the Speaker of the House of Representatives on Feb. 16, 1921.]

CHECK CLEARING AND COLLECTION.

Substantial progress has been made during the year in the development of the Federal Reserve check clearing and collection system. During the year 11 States—Virginia, West Virginia, Kentucky, North Carolina, Arkansas, Arizona, Wisconsin, Minnesota, South Dakota, Washington, and Oregon—have been added to the number of States in which all banks are on the par lists of the Federal Reserve Banks. On January 1, 1920, checks on all but 3,996 of the 29,557 banks in the United States could be collected at par through the Federal Reserve Banks. On January 1, 1921, checks on all but 1,755 of the 30,523 banks in the United States could be thus collected. These 1,755 banks are all located in the following seven States of the Southeast: Tennessee, South Carolina, Louisiana, Mississippi, Alabama, Georgia, and Florida. Consequently, every bank in 9 of the 12 Federal Reserve districts is on the par lists, the three districts in which there remain any nonpar banks being those of Richmond, Atlanta, and St. Louis.

This development in the check clearing and collection system has been accomplished in the face of continuous opposition on the part of some member and nonmember banks. It is evident that as the merits of par collection are becoming more widely

known fewer banks are participating in the opposition, but the banks which continue to oppose par collection are well organized and their opposition appears to be as vigorous as ever.

In order to present clearly the issue involved in the controversy over par collection, it is necessary to review the history of the development of the check-collection system under the Federal Reserve Act. That history is given at some length in the letter of the Governor of the Federal Reserve Board, dated January 26, 1920, to the President of the Senate in response to Senate resolution No. 284 of January 19, 1920. This letter was printed as Senate Document No. 184.

The provisions of the Federal Reserve Act which relate to check clearing and collection were last amended by the act of June 21, 1917. Section 16 provides that the Federal Reserve Board may act as a clearing house for the Federal Reserve Banks and may require those banks to act as clearing houses for their member banks. Section 13 as amended by the so-called "Hardwick amendment" of June 21, 1917, provides that Federal Reserve Banks may receive on deposit "checks and drafts payable upon presentation," the checks which those banks are authorized to receive on deposit not being limited, as they were prior to the amendment, to checks on "solvent member banks." The proviso at the end of the first paragraph of section 13 reads:

That nothing in this or any other section of this act shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regulated by the Federal Reserve Board, but in no

case to exceed 10 cents per \$100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; *but no such charges shall be made against the Federal Reserve Banks.*

As construed by the Attorney General, and as recently held by the United States Circuit Court of Appeals, Fifth Circuit, these provisions prohibit the Federal Reserve Banks from paying exchange charges to member or nonmember banks.

It is apparent that if Federal Reserve Banks in their capacities as clearing houses are to render full service to their member banks, they must clear checks drawn on all banks including those nonmember banks, now few in number, which decline to remit at par. Consequently, the Board has approved the action of the Federal Reserve Banks not only in soliciting nonmember banks to agree to remit at par but also in collecting by presentation at the counter checks drawn on nonmember banks which decline to remit at par.

Opposition on the part of the banks against par collection has taken various concrete forms. Since Federal Reserve Banks can not pay exchange charges, when nonmember banks refuse to remit at par the Federal Reserve Banks have no choice, if they are to collect the checks drawn on those nonmember banks but to make presentation of such checks at the counters through selected agents. These agents may be employees of the Federal Reserve Banks or may be banks, express companies, or any other suitable agents located in the same town. The employees and agents of the Federal Reserve Banks have encountered vari-

ous obstacles in making presentation of checks, such as the tender of payment in a manner calculated to take as much time as possible, or the refusal of payment in reliance on the inability of the agent to find a notary public willing to make protest. The Board has been advised of one instance where a duly appointed agent has within a few days after appointment given notice to the Federal Reserve Bank that he would no longer act as agent for fear of injury to his business.

Other banks, including some member banks, have resorted to the device of stamping legends on their blank checks to the effect that the check is not valid if presentation is made through the Federal Reserve Banks.

On January 22, 1920, a number of nonmember banks filed a petition in the Superior Court of Fulton County, Ga., for an injunction restraining the Federal Reserve Bank of Atlanta from collecting checks drawn on the plaintiff banks in any manner other than through the mails. The suit was transferred to the United States District Court for the Northern District of Georgia, which dismissed the complaint upon the merits. The decision of the district court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on November 19, 1920, and the case has now been appealed to the Supreme Court of the United States. The restraining order, obtained by the plaintiff banks at the commencement of the suit, has been continued pending the appeals to the Circuit Court of Appeals and the Supreme Court of the United States; and this accounts in large part for the fact that no material progress has been made by the Federal Reserve Bank of Atlanta in adding to

the number of banks whose checks it can collect at par.

The legislatures of five States, namely, Mississippi, Louisiana, South Dakota, Georgia, and Alabama, have enacted laws for the express purpose of preventing the Federal Reserve Banks from collecting, at par, checks drawn on the banks located in those States. The Mississippi law purports to require all banks within the State, including national banks, member banks, and nonmember banks, to make charges "for collecting and remitting" cash items which "are presented to the payer bank for payment through or by any bank, banker, trust company, Federal Reserve Bank, post office, express company, or any collection agency, or by any other agency whatsoever." The laws of the four other States are not mandatory, but merely purport to give to all banks within the respective State the right to make similar charges. The laws of Mississippi, Louisiana, South Dakota, and Alabama prohibit any officer of the respective State from protesting any check for nonpayment, when such nonpayment is on account of the refusal of any such agency to pay exchange, and the laws of Mississippi, Louisiana, and South Dakota further provide in terms that "there shall be no right of action, either at law or in equity, against any bank in this State for a refusal to pay such cash item, when such refusal is based alone on the ground of the nonpayment of such exchange." The Federal Reserve Board has taken the position that these laws are clearly unconstitutional in so far as they purport to require national banks, and State banks which have joined the Federal Reserve System, to make exchange charges against Federal Reserve Banks.

The Board has obtained no opinion as to the constitutionality of the laws in so far as they purport to affect nonmember State banks, believing that this is a question which can be settled only by the courts. Prior to the enactment of the South Dakota and Louisiana laws, all banks in South Dakota, and in that part of Louisiana which is located in the Eleventh Federal Reserve District, had been placed upon the Federal Reserve Bank par lists, and the Federal Reserve Banks of Minneapolis and Dallas have since the enactment of those laws continued to receive for collection at par all checks drawn on those banks.

In February the Board's attention was called to certain charges made by State bankers in Nebraska that employees of the Omaha branch of the Federal Reserve Bank of Kansas City had acted in an unseemly manner and had used oppressive methods in the presentation of checks on nonmember banks. The Board held hearings on February 24, 25, and May 5 to inquire into these alleged acts and methods, at which hearings the Federal Reserve Bank officials and employees involved were examined under oath and denied the charges in every particular. The hearings were attended by a delegation of Congressmen from Nebraska, and the State bankers making the charges and their witnesses were also invited to be present. For the convenience of the latter the Board offered to have a committee of its members hold a hearing in Nebraska. No witnesses on behalf of the State bankers were produced, however, and the only evidence submitted in support of the charges consisted of a series of affidavits. In no instance, in the Board's opinion, was any specific charge of improper conduct on the part of an employee of the Omaha branch substantiated.

In view of all the circumstances, and at the request of some of the opponents of par collection, the Board concluded to present the facts to Congress for such action as that body might care to take. In accordance with this determination the Board on May 5, 1920, addressed a letter to the chairman of the Banking and Currency Committee of the House of Representatives. In this letter the Board called attention to the persistent opposition to par collection and to the obstacles which the Federal Reserve Banks were encountering, and suggested that the committee might deem it advisable to consider whether the par collection of checks should continue to be a function of Federal Reserve Banks, with a view to recommending a further amendment to the law which would either remove the obstacles standing in the way of par collection at the present time or permit both member and nonmember banks to make exchange charges against the Federal Reserve Banks, such charges, of course, to be reimbursed to the Federal Reserve Banks by the banks sending the checks for collection.

The Board is thoroughly convinced of the advantages of a universal system for the par collection of checks, and it brought the matter to the attention of Congress, not because of any doubt on its part as to the effect of the law, but because the issue involved the propriety of the legislation itself. The Board has frequently had occasion to point out that in their origin exchange charges were justified on account of the necessity for, and the high cost of, actually transporting currency, but that under existing conditions those charges can be justified upon no scientific or economic principle, since the payment of checks at places other than where the drawee

banks are located involves little expense and that is borne by the Federal Reserve Banks. Even the banks which decline to remit at par to the Federal Reserve Banks receive the benefits of the Federal Reserve check-clearing facilities by having the checks which they receive collected through a correspondent bank which is a member of the Federal Reserve System although they contribute nothing to the strength of the system. To the extent that the practice of charging exchange is continued under the operation of the Federal Reserve System, it is an anachronism which permits the charging banks to impose a charge upon commerce and industry after they have ceased to perform the service which in former times justified the imposition of such a charge. In this connection the following is quoted from a letter dated April 1, 1920, addressed by the Board to a United States Senator:

Since the establishment of the Federal Reserve Banks the cost of transferring balances from one section of the country to another has been almost entirely eliminated. Each Federal Reserve Bank carries a portion of its gold reserve in a gold-settlement fund which is kept in the Treasury at Washington, and there is a daily telegraphic clearing conducted by the Federal Reserve Board for all 12 banks and for their branches. The amount of gold in the fund is practically a stable quantity, but its ownership varies from day to day according to the debits and credits to the different banks. Transfers are made by the Federal Reserve Banks for member banks, and also for nonmember banks through the medium of member banks, by telegraph with-

out any charge whatever to the member bank or its client, all costs being borne by the Federal Reserve Banks. Thus a bank in Wisconsin or California, Maine or Texas, can secure an instantaneous transfer to any one of the 12 Federal Reserve cities or to the 20 cities where there are branch Federal Reserve Banks without any expense whatsoever, and the sum total of these transfers is settled daily through the gold-settlement fund above referred to. The Federal Reserve Banks pay all costs of transporting currency to or from their member banks as well as transportation charges on currency sent them by nonmember banks in payment of checks.

The total volume of transactions through the gold-settlement fund in the year 1919 was approximately \$74,000,000,000, and the total cost, including the expense of the leased wires, was about \$250,000. This cost was borne by the Federal Reserve Banks and does not represent any expense whatever to the member banks or their customers. Thus it will be seen that the basic cost of making domestic exchange in the year 1919 was 0.3 of a cent for each \$1,000 transferred. A charge of 10 cents per \$100 on the amount cleared through the gold-settlement fund would have involved an expense of \$1 for each \$1,000 transferred, or about \$74,000,000 for the entire amount.

The intradistrict clearings made by the Federal Reserve Banks, eliminating duplications, amounted to about \$135,000,000,000, and the total expense of these transfers was borne by the Federal Reserve Banks. Had the

Federal Reserve Banks been obliged to pay for these transfers at the rate of 10 cents per \$100, it will be seen that the total expense would have been \$135,000,000, which amount is far in excess of the total earnings of the Federal Reserve Banks and therefore could not have been absorbed by them. If not absorbed, the charge would have had to have been transferred to the depositors of the checks, so it will be seen that a charge of 10 cents per \$100 upon the business handled by the Federal Reserve Banks would have involved last year a cost to the commerce and industry of this country of at least \$135,000,000.

The Federal Reserve Board believes that the present terms of the Federal Reserve Act impose upon it the duty of developing and maintaining the Federal Reserve par collection system, while the opponents of par collection vigorously urge the contrary view. The opinion of the United States Circuit Court of Appeals, previously referred to, decisively upholds the Board's point of view, and, Congress having taken no action in the matter of further legislation on the subject, the Board will, of course, regard as binding upon all parties the final interpretation of section 13 of the Federal Reserve Act by the Supreme Court of the United States. Consequently, unless that court reverses the decision of the United States Circuit Court of Appeals, the Board will assume that Congress desires the Federal Reserve Board and the Federal Reserve Banks to continue, as heretofore, to develop and perfect the Federal Reserve par collection system.

Until the United States Supreme Court renders its decision in the appeal now pending before it, the

opinion of the United States Circuit Court of Appeals must, of course, be regarded as conclusive as to the construction of the law. The following extract from that opinion sustains in every respect the position which the Board has always taken that its duty under the law as it now stands is to develop and perfect the Federal Reserve par collection system.

The principle that one must so use his property as not to unnecessarily and maliciously injure his neighbor, even though his act is otherwise lawful, is also invoked. Conceding that the accumulating of checks, and their presentation, when accumulated, with the intent to embarrass and injure the drawee bank, might constitute an actionable wrong and one that might be prevented by injunction, we do not think the amended bill presents any such case. There is no specific charge in the bill of any threat to present the checks in any accumulated or oppressive manner, on which a court of equity would be justified in acting. Nor does the bill charge the appellee bank with acting from a merely malicious motive, if that is material. It does aver that the purpose of the appellee was to compel the appellants to accept the lesser of two evils and to remit at par for checks drawn upon it. If this charge was borne out by the exhibits, which it is not, it would not constitute legal duress, on which a legal complaint could be predicated. The exhibits show that the adoption of a system of universal par clearance was advocated in good faith by the appellee bank as a proper banking policy, and as well by Congress and the Federal Reserve Board. The adoption of appropriate

means of the appellee bank to accomplish this end can not with any propriety be attributed to malice on its part against appellants and other banks in like condition. Nor does the adoption of the method of presenting checks over the counters of the drawee bank imply an attempt to coerce them into becoming member or depositing banks. The Federal Reserve Bank was interested to supply a universal clearance at par for its member and depositing banks. It could accomplish this only by accepting from its member and depositing banks all checks tendered it by them upon whatever banks drawn. If drawn upon a non-member and nondepositing bank, which refused to remit at par, it was disabled under the statute from handling such checks through the method of transmission of the checks and remittance of the proceeds through the mails. It could only collect such checks by presentation in person to the drawee bank. It is, therefore, reasonable to suppose that its declared purpose of making such presentations was in furtherance of its policy of furnishing complete clearing facilities to its member banks, and was not for the purpose of injuring or destroying the drawee banks, or of coercing them into becoming member or depositing banks with it. It constituted an essential step without which universal par clearance was not possible of accomplishment.

In the following table are given the number and amount of checks and drafts handled by the Federal Reserve Banks during monthly periods in 1920:

Items handled by all Federal Reserve Banks combined.

[Exclusive of duplications on account of items being handled by more than one Federal Reserve Bank or Branch.]

Month ending—	Total items handled.		Items drawn on banks in district of reporting F. R. bank or branch.		Items drawn on United States Treasurer.		Items forwarded direct to members and nonmembers in other F. R. districts.	
	Number.	Amount. Thousand dollars.	Number.	Amount. Thousand dollars.	Number.	Amount. Thousand dollars.	Number.	Amount. Thousand dollars.
Jan. 15, 1920.....	33,308,267	14,044,656	31,212,530	13,298,354	1,090,303	745,921	5,365	2,451
Feb. 15, 1920.....	30,967,498	12,519,612	29,165,181	11,868,671	1,802,000	535,929	5,215	2,015
Mar. 15, 1920.....	33,568,251	13,158,293	31,096,861	12,845,019	1,565,965	595,415	5,666	1,826
Apr. 15, 1920.....	38,406,451	14,451,922	36,207,429	13,867,468	2,192,547	882,565	6,475	1,969
May 15, 1920.....	37,176,088	12,630,472	34,480,874	12,338,083	2,689,238	479,038	5,928	1,741
June 15, 1920.....	36,459,470	12,843,671	34,487,272	12,331,819	1,968,456	503,831	6,662	2,081
July 15, 1920.....	37,553,352	13,618,965	35,137,057	12,698,577	2,418,982	927,221	7,313	2,672
Aug. 15, 1920.....	37,032,060	12,308,370	35,045,843	11,818,377	1,992,664	352,166	6,538	1,965
Sept. 15, 1920.....	38,541,139	12,880,227	36,541,102	12,312,678	1,997,827	564,354	6,210	2,115
Oct. 15, 1920.....	40,674,502	13,677,098	38,158,780	12,347,090	2,510,644	427,398	7,078	2,440
Nov. 15, 1920.....	41,296,205	13,060,263	38,602,450	12,673,791	2,698,658	414,206	7,100	2,206
Dec. 15, 1920.....	41,766,941	12,060,079	39,062,305	11,469,686	2,675,262	486,043	7,544	2,100
Total.....	446,671,165	157,490,905	419,905,464	150,598,077	29,057,735	6,886,556	77,990	25,022
Monthly average.....	37,222,598	13,124,967	34,962,124	12,546,002	2,225,978	575,880	6,497	2,065

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1920.

No. 679.

AMERICAN BANK AND TRUST COMPANY ET AL.

VS.

FEDERAL RESERVE BANK OF ATLANTA ET AL.

ON APPEAL FROM FIFTH CIRCUIT COURT OF APPEALS.

**REPLY BRIEF OF APPELLANTS TO THE BRIEF
FOR THE FEDERAL RESERVE BOARD, FILED AS
AMICUS CURIAE.**

By leave of court appellants reply to the brief filed on behalf of the Federal Reserve Board, as *amicus curiae*, as follows:

The entire argument of learned counsel for the Federal Reserve Board is rested upon two premises:

First. That the Congress intended by its amendment to section 13 of the Federal Reserve Act, construed in connection with section 16 thereof, to establish a system of universal par clearance in the United States.

Second. That the establishment of such a system requires the Federal Reserve banks at any cost to collect all checks drawn on all the banks in the United States, regardless of their affiliation with the Federal Reserve system, without expense to the banks so placing said checks with the Federal Reserve banks for collection.

It is respectfully submitted that neither of these premises is sound. The brief of appellants deals with the first premise at some length, but the position was supplemented in oral argument by reference to the debates in Congress when the Hardwick amendment was adopted, and particularly to the underlying reason for the exemption of a Federal Reserve bank from payment of charges for the collection and remission of the proceeds of checks, whether by exchange or otherwise. For the convenience of the court the extracts from these debates and the letter from the Federal Reserve Board to the chairman of the House committee having in charge the bill to which the Hardwick amendment applied are hereinafter set forth.

Proponents of the second proviso to section 13 of the Federal Reserve Act disclose in their debates a clear understanding of the effect of incidental competition with non-member banks, but never dreamed that the monopolistic advantage inherent in the convergence of most of the channels of collection would be supplemented by irregular methods of collection such as were employed to drive some 16,000 State

banks to remit at par before the threat of similar methods in the sixth district resulted in the present law suit. Mr. Glass, who fathered the amendment in the House, used this language:

"The gentleman knows possibly better than I, that the Congress has not one particle of power to regulate the banks that are not in the Federal Reserve system. Non-member banks which are State banks are not directly affected by this legislation. They are concerned in this legislation only by reason of the competition incident to a collection system which the Federal Reserve Board has established."

Expense of Selling Liberty Bonds.

If one reads the whole debate on the subject, the conclusion is obvious that the conference report was adopted solely in order to protect the Reserve system from exchange charges in connection with transmitting the funds involved in the several Liberty loans. It is equally clear that the Federal Reserve Board foresaw the possibility of using the financial bludgeon involved in its exemption from exchange charges. When the Hardwick amendment was in conference, the Governor of the Federal Reserve Board wrote Mr. Glass as follows:

"WASHINGTON, May 10, 1917.

Honorable CARTER GLASS,
House of Representatives,
Washington, D. C.

DEAR MR. GLASS:

Since you were in my office this afternoon, Mr. Delano tells me he just had a talk over the telephone with Governor Strong of the Federal Reserve Bank of

New York. He calls attention to the possibility, if not strong probability, of the Government having to pay banks \$1,000,000 exchange charges in connection with subscriptions to the Liberty loan, assuming that the Hardwick amendment which the House has instructed its conferees to agree to becomes a law. This estimate is based on the assumption that one-half of the total issue of bonds will be placed outside of New York. Subscribers are permitted to make payment by their checks upon local banks properly certified, and under authority given by Congress many of these banks will undoubtedly avail themselves of the opportunity to charge one-tenth of 1 per cent. Should this exchange charge be applied to one-half of the subscriptions, the expense of the Government would be \$1,000,000.

I would suggest, therefore, that you call attention of Senator Owen to this, and suggest that he ask the Senate to reconsider the Hardwick amendment with a view to changing it so as to prevent it from applying to transactions connected with Government bonds. This I think would give you the opportunity that you desire to handle the matter in conference.

Yours very truly,

W. P. G. HARDING,

Governor Federal Reserve Board.

(Congressional Record, 65th Congress, page 3527.)

It is now claimed that the proviso, tacked on for the purpose of safeguarding the Reserve banks from the nominal charge of one-tenth of 1 per cent for the service of transferring funds arising from Liberty bonds was really intended to establish universal par clearance in the United States. That, instead of being exempted from the nominal collection

and remittance charge, the Reserve banks were thus authorized to incur any expense in the promotion of universal par clearance. This is a most remarkable conclusion in view of the express language of the Hardwick amendment.

It was obvious from the beginning of the campaign for universal par clearance that the country banks would submit to rendering service without compensation, by remittance at par, only if forced to do so. Consequently the old expedient of accumulating checks upon them and *demanding* currency over their counters was resorted to. This worked successfully throughout all the districts except in three or four States in the Northwest and in the fifth and sixth Federal Reserve districts, embracing the South Atlantic and Gulf States. As a sort of Christmas gift, the Federal Reserve bank in the sixth district sent broadcast on December 23, 1919, the circular (Exhibit B, Trans., p. 34) warning the country banks that the time had come to drive them in; that it was useless to stand out, because if they did the Federal Reserve bank would adopt methods of collection that would prove embarrassing, annoying, and expensive to them to such an extent that foregoing revenues from exchange would be the lesser evil (Trans., p. 35).

In this circular, certain palliatives were tendered by way of postage and express charges, but completely obliterated by requiring deposit for deferred credits. The purpose of establishing a national par list was stated and supported by the circular of the Federal Reserve Board attached as Exhibit A to the original bill (Trans., p. 30), and the suggestion was made that the loss of revenues to be suffered by the country banks could be made up out of their depositors.

Thus the plan was frankly laid bare. The co-operation of all the Federal Reserve banks and the Federal Reserve Board was made clear. The fate of over 16,000 banks in other districts was made known. The hopelessness of resistance was taken for granted. Meek compliance was evidently expected as a matter of course.

The accumulation of checks for payment in currency deranges the entire machinery of banking business to such an extent as to be intolerable. If persisted in it is destructive. It has been condemned by the Supreme Court of Minnesota. It violates the customs of banking to an extent that amounts to a breach of the contract arising between banker and depositor. So long as a bank is solvent and open for business under the regulation and permission of the governmental authority to which it is accountable, there is by universal custom an implied contract between the bank and its depositors that funds will be drawn against deposits only in regular course of business and through usual and customary channels.

Deposits are made and received with this understanding. This understanding and practice form the basis of all legal regulations fixing amount of reserves, and cash in vault requirements. All holders of bank checks are chargeable with notice of these laws, and the wilful accumulation of checks for payment in currency is a violation of every law of banking that would, if generally employed, demolish the entire foundation of the banking business. Because it is lawful to collect checks in currency in usual course, it does not follow that this right can be legally exercised in a manner to upset the whole business of a bank in order to force it to yield

its property rights in another direction. It is no exaggeration to say that the power to draw through its channels practically all checks drawn against deposits in any bank or community of banks in the country, and the will to demand payment of them in currency, gives the Federal Reserve banks a financial bludgeon the use of which is as destructive to the business of the drawee bank as the sand-bag is deadly to the wayfarer when wielded by the highwayman. The use of one is as reprehensible as the other, in their respective fields of operation. Counsel claim no originality in using this simile, for the author of the Hardwick amendment, the purpose of which was to safeguard the right of member banks themselves to charge exchange, said in debate (Congressional Record, 65th Congress, p. 3763).

"Most of us who supported this proposition (the Hardwick amendment) did it because we thought it was right, and because there was a real principle involved in it, namely, that we should not require service from anybody by law in this country without giving any compensation whatever for that service. Of course, this legislation could not apply to anybody else except to National banks. We cannot enact legislation of this sort with reference to State banks and we are acting only for banks that are under the control and jurisdiction of the Federal Government. Of course, it is true that under the language read by the Senator from Oklahoma (Mr. Owen) in the progress of the debate, these banks under regulations of the Federal Reserve Board have been literally forced not to charge the exchange that they are justly entitled to. They were like a man who surrenders at the point of a weapon to a highwayman. Yet the Senator from Vermont and others urge that against

them when they are required by law to give up this exchange under regulations established by the Federal Reserve Board."

All the members of Congress who debated the subject conceded that non-member banks were outside the operation of the law in substantially the same language quoted from Senator Hardwick. Note what Mr. Glass said:

"The Congress has no control whatsoever over non-member banks. It cannot regulate their charges and will not regulate them if this Hardwick amendment should prevail. * * * This House has no control over the non-member bank in this matter. Even the Federal Reserve Board has no control over their operations unless they voluntarily join the vountary collection system established by the Federal Reserve Board."

Page 3528: "No non-member bank that does not voluntarily join the collection system established by the Federal Reserve Board will be specifically affected. No law that we pass here can directly affect them. The only way they can be affected is incidental."

Again Senator Smith of Michigan used this language:

"But the Senator (Owen), I think, agrees with me that Congress would be powerless to regulate that charge so far as it relates to State banks operating under State laws. They must account to the State and be governed by State legislation," to which Senator Owen replied "yes."

Appellants allege, and the demurrer admits, that the demand for payment in this unusual and irregular manner

is influenced by considerations other than mere collection. If collection was the object why refuse to accept a draft instead of currency? Why condition the acceptance of such a draft upon agreement to make all future remittances without charge? In no case was there any question that such drafts, drawn on reserve deposits, were good for their face value.

It is obvious from the regulations of the Federal Reserve Board that the attempt to collect for members, and clearing members, checks on non-member banks that cannot be collected through regular channels at par is voluntary on the part of the Federal Reserve banks. It is equally obvious that the practice, under which sixteen thousand and odd banks have been forced to sign their par lists, has been adopted, not for the purpose of collecting checks presented for payment, but for the ulterior purpose of coercing the bank upon which those checks are drawn to sign the par lists.

Outside Checks Handled for Collection Only.

Attention is called to the statement on page 22 of the brief now being answered to the effect that the amendment of September 7, 1916, to section 13 of the Federal Reserve Act gave specific authority to the Federal Reserve banks to receive *on deposit* any checks and drafts payable upon presentation without further qualification. The quotation from this amendment immediately preceding this statement expressly limits this authority "*solely for purpose of exchange or collection.*" Hence the duty of the Federal Reserve bank as to any check so received for purposes of collection is that of a collection agent. If expense is required

in the performance of this duty, and the act forbids the Federal Reserve bank to incur such expense, then the conclusion of the Attorney General, quoted in the main brief, that the Federal Reserve bank cannot undertake such collection is absolutely unanswerable. But learned counsel say that the alleged illegal purpose charged as the motive for demanding currency and declining to receive bank drafts in payment of such checks is conclusively negated by the fact that the defendants intend to do just what the law purposed they should do, and the malicious motive is conclusively negated by the fact that the acts contemplated are the natural means and the only means of accomplishing these lawful purposes (Federal Reserve Board Brief, p. 39). We apprehend the court will have no difficulty in concluding that if collection, without more, was the object to be attained, the acceptance of a solvent bank draft payable to the order of the Federal Reserve bank, the value of which would be unaffected by theft or even by destruction, would be a very much more practical means of making the collection than transporting the actual currency which in case of destruction or successful theft is irretrievably lost. At any rate appellants are entirely content to match conclusions based upon such admitted facts.

Clearing-house Functions Again.

In replying to appellants' argument relating to the functions of clearing-houses, counsel for the Federal Reserve Board hopelessly confuse the operations of a clearing-house with those of a collection agency. The so-called county clearing-house adjunct to the Boston clearing-house is a

mere collection agency, through which the members of the clearing-house itself co-operate in collecting checks drawn on outsiders. The authority quoted from Thrall's Clearing-house uses the synonymous appellations "Country collection department" or "Country clearing-house" (see page 15 of the Solicitor General's Brief), which is best understood if it be considered a co-operative bank owned by the clearing-house. Mr. Thrall then explains (p. 16) that the "Country collection department" or "Country clearing-house" *is represented as a member* in the daily exchanges at the clearing-house. Instead of answering appellants' position as to the functions of clearing-houses, the argument in appellants' brief, beginning on page 160, is confirmed. Please note carefully that Mr. Thrall's description of the operations of the collection agency adjunct to the clearing-house carefully provides for exchange charges, which by consolidation of checks drawn on the same bank or the same town, effects savings in expense of handling. But the exchange charges are made and paid, nevertheless, and "are assessed against the members at the close of each month." The remainder of the paragraph now quoted from, on page 17 of the Solicitor General's brief, demonstrates that the making of exchange charges is a part of the system.

It passes comprehension that Congress intended to convert the Federal Reserve banks into country collection departments for their members by forbidding them to pay any exchange charges necessarily involved in performing the functions of such a collection agency. It reminds one of the classic permission to go swimming, which was granted, with the proviso, "Don't go near the water."

Federal Reserve Board's Annual Report.

As an appendix to the brief of the Federal Reserve Board a long extract is copied from the seventh annual report of the Federal Reserve Board for the year 1920. The case at bar is referred to and commented upon. Since this court can take no testimony in the case appellants' counsel assume that these statements and arguments of the Federal Reserve Board will receive no consideration at the hands of the court. The statistics as to the cost of operating the collection bureau of the Federal Reserve banks, stated to be \$250,000, cannot be considered by this court for the obvious reason that the cost of collecting checks of this character is alleged in the bill to be \$1.11 per thousand (Trans., p. 7, par. 12), and the demurrer to the bill admits the fact. Applying this rate to the alleged aggregate of \$135,000,000,000, it would cost \$148,500,000. As a matter of fact it did cost this amount or more, either by exchange of service or by actual outlay. Paragraph 7 of the regulations of the Federal Reserve Board contains this language:

"It is manifest that items in process of collection cannot lawfully be counted as part of the minimum reserve balance to be carried by a member bank with its Federal Reserve bank. Therefore, should a member bank draw against such items the draft would be charged against its reserve balance if such balance was sufficient in amount to pay it; but any resulting impairment of reserve balances would be subject to all the penalties provided by the act. Inasmuch as it is essential that the law in respect to maintenance by member banks of the required minimum reserve balance shall be strictly complied with, the Federal

Reserve Board, under authority vested in it by section 10 of the act, hereby prescribes as the penalty for any deficiency in reserves a sum equivalent to the interest charged on the amount of the deficiency of 2 per cent per annum above the ninety-day discount rate of the Federal Reserve bank of the district in which the member bank is located. The board reserves the right to increase this penalty whenever conditions require it."

As the discount rate has for some time been 6 per cent, 2 per cent penalty added thereto would make 8 per cent chargeable on any deficiency of balance to meet items in process of collection. If \$135,000,000,000 was transferred in a year consisting of three hundred business days, the average per business day would be \$450,000,000. Taking the country as a whole, the average time necessary to transmit checks through the mails and receive remittance of proceeds is not less than five days. In view of our "magnificent distances," it is very likely more than this average. Five times the average daily amount stated makes \$2,250,000,000 "afloat" during every day in the year according to the statistics of the Federal Reserve Board. Eight per cent interest on this amount means \$180,000,000 loss of the use of the money alone. This takes no account of the additional expense in connection with the collection and remission of proceeds of checks as set forth in paragraph 9 of the bill (Transcript, p. 5). The annual report from which said appendix is taken discloses the practical monopoly of all the banking channels through which checks drawn on any bank in the United States would ultimately be presented for payment, except the inconsiderable number used to supply ordi-

nary needs for currency in the pocket. It requires no effort, therefore, for the Federal Reserve bank to have in its hands the bulk of checks drawn on any given bank. Should the Federal Reserve Board choose to present these checks by special messengers, and not through ordinary banking channels, and would accept payment thereof in bank drafts, as it does in case the same bank would sign an agreement not to charge exchange, appellants would have no legal cause for complaint. They would have to take the consequences of the competition thus brought about by the monopoly of the Federal Reserve banks; but it is obvious that to do business in this way the cost to the Federal Reserve bank would be many times as great as the loss of exchange to the drawee banks. It is, therefore (although irrelevant), safe to assume that this particular burden of competition will not affect the business of the non-member banks. The real effect, by way of competition, on non-member banks brought about by the enforced remittance at par which has been required of the member banks relates to depositors who might remove their accounts from such banks and open them with banks on the par list. This was the incidental effect in the minds of the committee when the subject was under debate in Congress. In fact it amounts to nothing because the premise on which it is founded does not exist. That is to say, it is not true that no charge is made for the collection and remittance of proceeds of checks handled through the Federal Reserve banks and their members. On the contrary, a very distinct and real charge is made under the name of interest on the face value of the check for the time required to collect it and receive its proceeds. The net result, therefore, is the same; indeed, in some cases, this interest would be greater

than the customary exchange charge. Thus the claim of economic advantage in universal par clearance, *eo nomine*, fails. Real par clearance is an impossibility.

Prayers of the Bill.

Much comment has been made upon the prayers of the bill in this case. It is without any significance.

The first and basic prayer of the bill is to enjoin the defendants from inaugurating or adopting irregular methods of collection that would prove embarrassing, annoying, and expensive to appellants, and which defendants admit would prove embarrassing, annoying, and expensive to appellants. The additional prayer that the defendants be enjoined from collecting checks except through ordinary banking channels is no broader than the facts justify, but the result desired would be attained by enjoining them from demanding payment of checks, handled for banking purposes and in regular banking business, in funds other than those usual and customary in making such payment, and those which the Federal Reserve bank itself uniformly accepts in case of compliance with its demands to remit at par. When the prayer was framed by the pleader he assumed that if these funds would be acceptable to the collecting bank, checks would be presented for payment through the mails in regular course of banking business. If, however, the Federal Reserve bank desires to be at liberty to send these checks to the counter of the drawee banks, and there receive, without any deduction, payment thereof in bank drafts or other funds usually employed to make such payment, appellants could have no objection to the injunction being so framed as to afford liberty to make collection in this way.

Conclusion.

The following premises of law and fact are admitted of record:

1. Federal Reserve banks have no jurisdiction over non-member State banks.

2. Non-member State banks are invited to avail themselves of the facilities of Federal Reserve banks by joining the system, if qualified, or by carrying clearance deposit accounts to cover the "float" of collection items, and using the Federal Reserve banks as collecting agencies.

3. If the invitation is declined the Reserve banks undertake collection of checks on these outsiders by methods that are embarrassing, annoying, and expensive to the drawee banks.

4. If the invitation is accepted, the drawee banks must remit at par, and such remittance is acceptable whether in the form of currency or of bank drafts. Otherwise nothing will be accepted by the Federal Reserve banks except currency.

5. Payment in currency of all checks drawn on any given bank is impracticable because subversive of the principles of profitable banking business. Such a practice involves greater injury to such a bank than the loss of all service charges for transmitting funds would inflict.

6. In making collection by direct presentation, resorted to because the drawee bank refuses to remit at par, the agents of the Federal Reserve banks decline to accept bank drafts

at par and demand currency, but such demand is immediately withdrawn if the drawee bank will agree to go on the *par* lists of the Federal Reserve bank and thus waive all right to charge for remittances.

7. The Federal Reserve Act expressly recognizes and safeguards the right of all banks to make such charges, except against Federal Reserve banks.

From these premises conflicting conclusions are drawn by the parties before the court, *viz*:

By the Federal Reserve banks:

(a) That by reason of this exemption from exchange charges Congress directs the Federal Reserve banks to establish universal *par* clearance at any cost.

(b) That in carrying out this direction the Federal Reserve banks may employ irregular methods of collecting checks on non-member banks and incur any amount of expense in doing so, and inflict any degree of embarrassment, annoyance, and expense upon the non-member banks upon which such checks are drawn.

(c) That consequent injury to the recalcitrant outsider may be avoided by co-operation in universal *par* clearance.

(d) That the demand for currency is justified because, in ordinary course of business, a small percentage of bank checks are paid in currency.

(e) That the sufferer from such a method of collection has no redress in equity, and is left to choose the lesser of the two evils presented, *viz.*, *go on the par list*.

By appellants:

(a) The Congress not only did not direct the establishment of a system of universal par clearance, but plainly preserved the right of all banks, among themselves, to charge exchange.

(b) The exemption of Federal Reserve banks from such charges was designed to promote economy in their administration. It cannot consistently justify the extravagance of irregular methods of collection.

(c) That the irregular methods employed are not for the purpose of collection *per se*, but are intended to coerce remittance at par.

(d) Thus employed, they become unfair, oppressive, and illegal, and ought to be prohibited by injunction.

Decision of the case on the merits thus comes down to the determination of the correctness of the respective positions of the appellants and appellees as above analyzed.

Respectfully submitted,

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ATLANTA, GEORGIA, April 18, 1920.

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